Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,

Petitioner,

v.

UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture,

and

MONTANA WILDERNESS ASSOCIATION, PROFESSIONAL WILDERNESS OUTFITTERS, BACK COUNTRY HORSEMEN OF MONTANA, THE WILDERNESS SOCIETY, INC., SIERRA CLUB, MONTANA AUDUBON, NATIONAL WILDLIFE FEDERATION, KAA MO TAAN, and GEORGE ENGLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an organization, whose members have been denied the opportunity to bid for oil and gas leases on federal lands and have participated in the administrative process that led to a "no-leasing" decision, suffers an Article III "injury in fact" and, therefore, has standing to challenge the legality of the no-leasing decision?

2. Whether the prudential standing "zone of interests" test bars an organization from enforcing the procedural requirements of NEPA when that organization's interest in so doing is solely economic?

3. Whether, under NEPA, the psychological effects of an oil and gas leasing decision may be considered and serve as the basis for a no-leasing decision when the federal agency determines that leasing will not affect the human environment?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

In addition to Petitioners and Respondents listed in the above caption, the Rocky Mountain Oil and Gas Association ("RMOGA") participated in the proceedings before the District Court as Plaintiffs.

Petitioner, Independent Petroleum Association of America ("IPAA"), is a not-for-profit organization representing the nation's small and independent oil and gas producers. IPAA does not have a parent company nor does IPAA have corporate stock.

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Review is sought of the opinion of the United States Court of Appeals for the Ninth Circuit, *Rocky Mountain Oil and Gas Association and Independent Petroleum Association of America v. United States Forest Service, et al.*, 2001 WL 470022 (unpublished), affirming a grant of summary judgment for the United States by the U.S. District Court for the District of Montana. That Ninth Circuit Opinion appears at pages 2-4 of the Appendix ("App.") The District Court opinion, *Rocky Mountain Oil and Gas Association and Independent Petroleum Association of America v. United States Forest Service, et al.* (CV-98-22-H) (unpublished), appears at App. 6-15.

JURISDICTION

This Court has jurisdiction to hear this case under Article III of the United States Constitution and has the power to grant *certiorari* under 28 U.S.C. § 1254. The judgment for which review is sought was entered on May 3, 2001, by the United States Court of Appeals for the Ninth Circuit.

CONSTITUTIONAL PROVISION INVOLVED

This Petition for *writ of certiorari* concerns Article III, Section 2, of the United States Constitution. App. 16.

STATUTES INVOLVED

This Petition concerns portions of the Administrative Procedures Act, 5 U.S.C. §§ 551, *et seq.*, the National Forest Management Act, 16 U.S.C. §§ 1600, *et seq.*, App. 19-21, the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*, App. 17-19; and the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181, *et seq.*

STATEMENT OF THE CASE

Summary

This case concerns the ability of oil and gas operators, some of whom live, work, and recreate in Montana, who seek to develop energy resources on federal lands there and who participated in the process by which the U.S. Forest Service choose not to permit oil and gas leasing of those lands, to challenge alleged violations of federal mineral leasing and environmental laws. Notwithstanding their interest, their involvement, and their inability to bid for oil and gas leases, they have been held to lack Article III and prudential standing to challenge these violations, including a decision by the Forest Service that, notwithstanding the absence of any adverse environmental consequences, the lands would not be leased due to the non-specific, emotional concerns of those far distant from Montana. The irony of this view of standing is that those nearest to and most directly affected by the Forest Service's decision are unable to challenge what they believe to be the illegal elevation of the "emotion[al]" over the "scientific" in response to the demands of those whose closest contact with the subject federal lands will always be from afar.

The Overthrust Belt, a geologic formation that lies east of the Rocky Mountains as they stretch from New Mexico to Montana, is the most likely source for new onshore oil and gas discoveries on federal lands. Within the Overthrust Belt, one of the most likely sources for new energy production is an area in north-central Montana, specifically, the Lewis and Clark National Forest ("Lewis and Clark"). The portion of the Overthrust Belt within the Lewis and Clark contains in excess of 20

trillion cubic feet of recoverable natural gas, the production of which could generate as much as 40 million dollars annually.[1]

Consistent with its obligations, under a host of federal laws, to ensure the development of such an important energy resource while protecting federal lands and the environment, the Forest Service initiated the process necessary to determine whether to issue oil and gas leases in the Lewis and Clark. Throughout that process, the Forest Service recognized both the presence of rich oil and gas resources and the ability to explore for and develop those resources without harm to the environment. Inexplicably, the Forest Service then determined that, notwithstanding the absence of harm to the environment from oil and gas leasing, it would prohibit leasing because of the "emotions," "feel[ings]," and "perceptions" of those opposed to leasing. When oil and gas operators sought to challenge alleged violations of various mineral leasing and environmental statutes, the U.S. District Court in Montana and the U.S. Court of Appeals for the Ninth Circuit ruled that they lacked Article III standing and failed to meet the "zone of interests" test of NEPA. These courts also held that psychological harms, unconnected to any on-the-ground environmental impact because there would be no such impact, could serve as the basis for the Forest Service decision.

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[1] "Domestic Natural Gas Supply and Demand: The Contribution of Public Lands and the OCS" (www.house.gov/resources/107cong/energy/2001mar15/fischer.htm); "Lewis and Clark National Forest Oil and Gas Leasing: Final Environmental Impact Statement," September 1997, Appendix B at 42(d).

Statutory Background

This case involves primarily three federal statutes. First, the National Forest Management Act of 1976 ("NFMA"), 16 U.S.C. §§ 1600, *et seq.*, requires the Forest Service to develop, maintain, and, "as appropriate," revise land management plans ("forest plans") for each of the national forests. 16 U.S.C. § 1604(a). All use of the resources within a specific national forest is controlled by its forest plan and must be consistent with it. 16 U.S.C. § 1604(i). The forest plan must be developed according to a "systematic interdisciplinary approach" based on "physical, biological, economic, and other sciences." 16 U.S.C. § 1604(b). NFMA also requires public participation in the promulgation, amendment, and revision of a forest plan. 16 U.S.C. § 1604(d). Specifically, the public must be given adequate notice and an opportunity to comment upon "the formulation of standards, criteria, and guidelines" applicable to forest plan revisions. 16 U.S.C. § 1612(a).

Second, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321, *et seq.*, requires federal agencies to prepare an environmental impact statement (EIS) for all proposed federal agency actions "significantly affecting the quality of the human environment,"[2] in order to encourage "productive and enjoyable harmony between man and his environment," to fulfill "economic and other requirements of present and future generations of Americans," 42 U.S.C. § 4331(a), and to

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[2] The term "human environment" is "interpreted comprehensively" to include "economic or social and natural or physical environmental effects" when such effects are interrelated. 40 C.F.R. §-1508.14.

attain "the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." 42 U.S.C. § 4331(b)(3). The federal agency must first issue a Draft EIS for public comment and explain, "to the fullest extent possible," "all major points of view on the environmental impacts of the alternatives. . . . " 40 C.F.R. § 1502.9(a). After receiving public comment, the agency must issue a Final EIS that discusses any "responsible opposing view which was not adequately discussed in the [Draft EIS]." 40 C.F.R. § 1502.2(b). The agency must prepare a supplemental impact statement whenever there are "significant new circumstances or information . . . bearing on the proposed action or its impacts" that have not been adequately addressed in either the Draft or Final EIS. 40 C.F.R. § 1502.2(c)(1)(ii). Finally, the agency must issue a record of decision (ROD) discussing all "relevant factors including economic and technical considerations" that went into the agency's final decision. 40 C.F.R. § 1505.2(b).

Third, the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181, *et seq.*, sets forth the manner in which federal lands are to be made available for oil and gas leasing. Until 1987, the Bureau of Land Management (BLM) had sole authority to issue such leases on national forest lands, after considering, but not necessarily conceding to, Forest Service recommendations regarding oil and gas leasing. In 1987, Congress amended the MLA by barring the BLM from issuing oil and gas leases in national forests without the express prior approval of the Secretary of Agriculture. 30 U.S.C. § 226(h). In March 1990, the Forest Service adopted regulations implementing the 1987 MLA amendments. 36 C.F.R. § 228.102. The regulations require the Forest Service to review all

national forest lands not already analyzed for oil and gas leasing and, then, (i) to designate lands that are "administratively available" for oil and gas leasing, 36 C.F.R. § 228.102(d), and (ii) to designate which administratively available lands may be leased. 36 C.F.R. § 228.102(e). Thereupon, the BLM is authorized to offer such lands for oil and gas leasing. *Id.*

The Forest Service Decision At Issue

In 1986, pursuant to NFMA, the Forest Service completed the Forest Land and Resource Management Plan ("Forest Plan") for the Lewis and Clark. In its Forest Plan, the Forest Service announced its intentions to permit the exploration for and development of energy resources within the Lewis and Clark:

> [A]pproximately 1.4 million acres of National Forest land on the Lewis and Clark National Forest, including potentially oil and gas-rich land in the Rocky Mountain Division, are available for mineral entry and leasing under the Forest Plan.

Final EIS, at I-8.

In July 1996, the Forest Service published a Draft EIS regarding the Lewis and Clark to comply with the 1987 MLA amendments. "Draft Environmental Impact Statement July 1996." The Draft EIS listed a number of alternative oil and gas options, including Alternative 7, the preferred alternative, which limited leasing activities to two mile-long strips within the Rocky Mountain Division, one bounded by existing roads, the other, by the boundary of the Lewis and Clark. Draft EIS Summary, at 4. The first area could be leased only under strictly "controlled" conditions to prevent any environmental damage to the area. As to the second area, the Forest Service imposed

"No Surface Occupancy" (NSO) restrictions; that is, exploration activities could be conducted only by means of directional drilling from surface locations outside the Lewis and Clark. *Id.*

Furthermore, preferred Alternative 7 did not allow for any oil and gas leasing activities in a portion of the Rocky Mountain Division known as the "Badger-Two Medicine Area" (Medicine Area), which contained an "identified cultural district" created to protect prehistoric and historic cultural sites, traditional cultural properties, and religious use by American Indians. Draft EIS, at II-3. Therefore, the Forest Service concluded that there would be no adverse effects from oil and gas leasing to any "traditional cultural properties in the [Medicine Area]." *Id.*

When the Draft EIS was released for public comment, Independent Petroleum Association of America ("IPAA"), a not-for-profit organization representing the nation's small and independent oil and gas producers, as well as some of its members, participated in the public comment process by expressing their support for the limited, environmentally sensitive oil and gas leasing proposed by Alternative 7.

On August 28, 1997, the Forest Service issued a Final EIS on oil and gas leasing in the Lewis and Clark. "Final Environmental Impact Statement September 1997." In the Final EIS the Forest Service modified its preferred alternative, Alternative 7, "to address concerns of the many people who took the time to respond to the Draft EIS." Final EIS Summary, at 4. In response to public comments about "social values placed on the Rocky Mountain Division," the Forest Service reduced the size of the leasable

areas by 20,000 acres, eliminated any leasing within grizzly bear habitat or near wilderness study areas, and prohibited all leasing within the Rocky Mountain Division except in those areas that could be explored and developed using directional drilling techniques from surface locations outside the Lewis and Clark. Final EIS, at II-16. Thereupon, the Forest Service re-affirmed its preference for Alternative 7:

> This alternative responds to public concern regarding oil and gas development on the Rocky Mountain Division . . . while providing limited opportunities to explore for oil and gas. . . . Leasing would be allowed in some areas on a 1-mile strip along the eastern perimeter of National Forest lands on the Rocky Mountain Division to provide opportunities to extract oil and gas resources beneath the National Forest from surface locations outside the forest boundary, using directional drilling techniques. *All other areas on the Rocky Mountain Division would not be leased.*

Final EIS Summary, at 4 (emphasis in original).

In the Final EIS, the Forest Service again confirmed its obligations:

> [t]o implement Congressional direction for oil and gas leasing . . . [and to] support, facilitate, and administer the orderly exploration, development, and production of mineral and energy resources on National Forest System lands to help meet the present and future needs of the Nation. The purpose of the proposed action is to contribute to the economic well-being of local communities and to the strategic interests of the nation while protecting other resource values.

Final EIS, Sec. I, at 7. The Forest Service also emphasized that leasing within the Rocky Mountain Division was essential to satisfy these strategic interests:

> The entire Rocky Mountain Division has been rated as having a high potential for the presence of hydrocarbons. Most of the past oil and gas activity, and projected future oil and gas activity, is located on the Rocky Mountain Division.

Final EIS, Sec. III, at 9.

On the same day that the Forest Service issued the Final EIS, the Forest Service also issued a final record of decision ("ROD") wherein the Forest Service admitted that oil and gas leasing activities within the Rocky Mountain Division would not harm the physical environment:

> This analysis as well as other previous analyses addressing oil and gas issues on the Rocky Mountain Division show that limited and closely controlled oil and gas exploration and development can take place in this area without significant negative impacts to wildlife or other surface resources values.

ROD at 5. Nevertheless, completely abandoning its position in the Final EIS, the Forest Service prohibited all oil and gas leasing in the entire Rocky Mountain Division in response to "emotions," "feel[ings]," and "perceptions" about oil and gas leasing activities:

> A majority of the concerns . . . were expressed regarding the 'value of place,' speaking in particular to social and personal values attributed to the Rocky Mountain Division. . . . Many *feel* that development of any kind, particularly oil and gas development, would 'ruin' the special feeling of the Front, *regardless of whether they ever saw or experienced the results of development*. Their *perceptions* about the value and spirituality of a place would be affected.

ROD at 4 (emphasis added). The Forest Service acknowledged further that those objections came from commenters who did not understand that oil and gas leasing

would not have any adverse impact upon the physical environment:

> Many of those who commented during the process admitted they have not read the environmental analysis and many may not fully understand – or care to understand – the analysis. They simply want to express their *heartfelt emotions* about a place they consider special.

Id. (emphasis added). The Forest Service admitted that these "value of place" concerns "figured prominently" in its decision to bar oil and gas leasing in the Rocky Mountain Division, even though "value of place" concerns were "difficult to quantify or [even to] describe," and even though these subjective, psychological concerns had never been discussed by the Forest Service as a possible basis for its decision. *Id.*

The Decisions Below

On March 7, 2000, the U.S. District Court for the District of Montana granted the Forest Service's motion for summary judgment, noting that because the "question of [IPAA's] standing is intertwined with the merits of the case, the court considers both simultaneously." App. 11. First, the District Court held that NEPA did not prevent the Forest Service from "allow[ing] public sentiment to override scientific approval of oil and gas leasing in the Rocky Mountain Division." App. 11. Second, the District Court held that IPAA's argument that "value of place" is not cognizable under either NEPA or NFMA "boil[s] down to semantics." App. 11. Third, the District Court held that, while the Forest Service never discussed the "value of place" criterion in either the Draft or Final EIS, the "value of place" criterion was "inextricably part of the recreation and tourism criteria." App. 11-12. Finally,

the District Court held, without any explanation, "the court finds a lack of standing to sue. . . . " App. 13.

On May 3, 2001, the United States Court of Appeals for the Ninth Circuit upheld the District Court's decision. The Ninth Circuit held that: (i) IPAA lacked Article III standing for its NEPA and NFMA claims "because the Forest Service has discretion whether to authorize the leasing of any particular Forest Service lands for mineral exploration." App. 2; (ii) IPAA had "no 'right' to bid for leases on Forest Service land" and, therefore, IPAA had suffered no "injury in fact" for purposes of Article III. App. 3; (iii) IPAA had no right "to compel the Forest Service to authorize leasing of its land for mineral exploration," therefore, IPAA had suffered no injury for purposes of Article III. *Id.*; (iv) IPAA had no "procedural right to the proper administration of [NFMA and NEPA]." *Id.*; (v) IPAA lacked prudential standing to raise its NEPA claims because "its interest in enforcing the statute is purely economic, and as such does not fall within NEPA's zone of interests." *Id.*; and (vi) the Forest Service's leasing decision was not arbitrary or capricious because, "the psychological effects of an agency's decision may be considered under NEPA." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION IS IN DIRECT AND INTOLERABLE CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS REGARDING THE ARTICLE III "INJURY IN FACT" REQUIREMENT.

The Ninth Circuit held that IPAA lacks standing to challenge the Forest Service's no-leasing decision "because the Forest Service has discretion whether to authorize the leasing of any particular Forest Service lands for mineral exploration." App. 2. The Ninth Circuit

concluded, "[b]ecause the [MLA] gives the Forest Service this discretionary power, IPAA has no 'right' to bid for leases of its land for mineral exploration. Lacking such a right, IPAA suffered no injury in fact as a result of the Forest Service's decision not to lease . . . " App. 2-3.

The Ninth Circuit's opinion confuses the doctrine of judicial reviewability with the Article III "injury in fact" requirement. The legal tests applicable to the doctrine of judicial reviewability do not apply to the Article III analysis, and visa versa. Applying the holdings of this Court to each issue, it is clear that: (i) the no-leasing decision is subject to judicial review; and (ii) IPAA suffered an "injury in fact" and, therefore, has standing to challenge the no-leasing decision.

A. Parties Adversely Affected By Discretionary Agency Decisions Have Standing Except Where There Is Clear And Convincing Evidence Of A Contrary Legislative Intent Or Where There Is No Law To Apply.

All agency action is presumed to be judicially reviewable. "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). *See also, Barlow v. Collins*, 397 U.S. 159, 166 (1970) ("[J]udicial review of [federal] administrative action is the rule, and nonreviewability an exception which must be demonstrated.") The statutory and regulatory authority on which the Ninth Circuit relied provides no evidence whatsoever, let alone "clear and convincing evidence,"

that Congress intended the Forest Service's leasing decisions to be immune from judicial review.[3]

Additionally, the Ninth Circuit failed completely to apply the "generous review provisions" of the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551, *et seq.*, to the no-leasing decision, as required by *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). More specifically, in *Citizens to Preserve Overton Park*, this Court held that, under the APA, discretionary agency action is always judicially reviewable except "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Id.* The NFMA, NEPA, and MLA are not drawn so broadly that there is "no law to apply." *Id.* In fact, the decisions of this Court are replete with holdings applying the law set forth in each of these statutes.

The Ninth Circuit's holding, that IPAA had no standing because the Forest Service's decision was discretionary, conflicts with this Court's holdings because there is no evidence that Congress intended to prohibit federal courts from reviewing oil and gas leasing decisions and because there is "law to apply" in determining whether the Forest Service, in making its leasing decision, complied with NFMA, NEPA, and MLA. This Court should grant *certiorari* to address that conflict.

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[3] For example, the Ninth Circuit cites a portion of the MLA that prohibits the Secretary of the Interior from issuing oil and gas leases on National Forest System Lands "over the objection of the Secretary of Agriculture." 30 U.S.C. § 226(h). Similarly, the Ninth Circuit cites several Forest Service regulations, which address and concern the creation of forest plans, but which do not speak to whether Congress intended to place the Forest Service's leasing decisions beyond judicial review. 36 C.F.R. § 219.10-219.12; 36 C.F.R. § 228.102(e).

B. Parties Wrongfully Denied The Opportunity To Bid On Federal Oil And Gas Leases Have Standing.

The "injury in fact" requirement is part of the Article III standing analysis well-known to this Court. To have standing under Article III, an organization must have suffered an " 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not conjectural or 'hypothetical.' " *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Ninth Circuit ruled that IPAA suffered no "injury in fact" as a result of the Forest Service's no-leasing decision because IPAA had no "right" to: (i) "bid for leases on any Forest Service land," or (ii) "compel the Forest Service to authorize leasing of its land for mineral exploration." App. 3.

1. When The Government Wrongfully Denies Parties An Opportunity To Bid For Valuable Rights Those Parties Suffer An Injury In Fact.

It is well established by the decisions of this Court that when the government wrongfully denies parties the opportunity to bid for valuable rights those parties suffer an "injury in fact."[4] For example, in *Bryant v. Yellen*, 447

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[4] Congress created a legally protectable "right to bid" for oil and gas leases on Forest Service lands as evidenced by the plain language of the MLA. Specifically, the MLA provides: "Lands within known geologic structures of a producing oil or gas field . . . shall be leased . . . to the highest responsible

U.S. 352 (1980), individualswishing to purchase lands within the boundaries of a special irrigation district sued the Secretary of Interior to enforce a provision in the reclamation laws that may have forced large landowners to sell their excess acreage at prices below the prevailing market price for irrigated land because that acreage could no longer be irrigated. 447 U.S. at 367. The Secretary argued that the individuals lacked standing because a court could not compel the large landowners to sell. Rejecting the Secretary's argument, this Court held that, even though the individuals "could not with certainty establish that they would be able to purchase excess lands," *Id.* at 367-68, the individuals had standing because it was "likely that excess lands would become available at less than market prices." *Id.* at 367-68. Like the individuals in *Bryant*, IPAA and its members have standing even though they cannot "with certainty establish that they would be able to [secure oil and gas leases]." Also, like the individuals in *Bryant*, IPAA and its members have standing because they are prepared to bid for oil and gas leases and because it is "likely" that lands in the Lewis and Clark "would become available" if the Forest Service complies with federal law in making its leasing decision.

Similarly, in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville,*

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qualified bidder by competitive bidding. . . . The Secretary shall accept the highest bid from a responsible qualified bidder which is equal to or greater than the national minimum acceptable bid, without evaluation of the value of the lands proposed for lease. 30 U.S.C. § 226(b)(1)(A). IPAA is made up of numerous "responsible qualified bidder[s]" who have bid on and received oil and gas leases on federal land in the past.

508 U.S. 656, 666 (1993), an association of general contractors ("AGC") brought action against the City of Jacksonville challenging an ordinance that gave preferential treatment to certain minority-owned businesses in the awarding of city contracts. The Eleventh Circuit held that the association and its members lacked standing because they could not demonstrate that, "but for the program, any AGC member would have bid successfully for any of these contracts." *Id.* at 664. This Court reversed, holding that the association "need not allege that [it] would have obtained the [contracts] but for the barrier in order to establish standing." *Id.* at 666. Rather, the association had standing because its members had demonstrated that they were "able and ready to bid on [any] contracts" to be let in the future by the City. *Id.*

This Court reached the same holding in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210 (1995), when it held that a highway construction subcontractor had standing to challenge the legality of a federal highway construction program: "Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract." *Id.* at 211. Adarand had standing because it had made "an adequate showing that sometime in the relatively near future it will bid on another Government contract" and because Adarand had shown that it was "very likely to bid on each such contract. . . . " *Id.*

Like the parties in *City of Jacksonville* and *Adarand*, IPAA and its members have standing because they are "able and ready to bid" on any oil and gas leases issued within the Lewis and Clark and because they are "very likely to bid on each such [lease]." The Ninth Circuit's decision is in direct conflict with these decisions. This Court should grant *certiorari* to address this conflict.

2. The Ninth Circuit's Decision Denying Oil And Gas Companies Standing To Challenge Illegal Oil And Gas Leasing Decisions Creates A Direct And Intolerable Split With The Eighth Circuit.

In *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 353-54 (8th Cir. 1984), Arkla, an oil and gas company, sought to enjoin the BLM from issuing oil and gas leases to one of Arkla's competitors on the grounds that the BLM had determined improperly that the leases were outside of any "known geological structure" and, therefore, not subject to competitive bidding. The BLM argued that Arkla lacked standing to challenge its discretionary leasing decision; however, the Eighth Circuit rejected that argument:

> Arkla's asserted right is the right to bid competitively on . . . tracts of land which the Secretary has reasonably classified and offered. Correlatively, they assert the rights [1] to have the lands not classified arbitrarily, [2] to have the Secretary utilize his discretion properly, and the right [3] to bid for all properly categorized and offered KGS lands for potential profit and exploratory public benefit. . . . Moreover, a proper KGS determination will protect Arkla's interest [4] in having an opportunity to participate in a lawful bidding process. . . .

Id. at 353-54.[5]

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[5] The Eighth Circuit's holding as to Arkla's right (1) "to bid [on federal oil and gas leases]" and (2) to "an opportunity to participate in a lawful [oil and gas leasing] process" is consistent with the holdings of this Court in *Bryant*, *City of Jacksonville*, and *Adarand*.

Like Arkla, IPAA has the "right to have the [Forest Service] lands not classified arbitrarily, to have the [Forest Service] utilize [its] discretion properly, . . . to bid for all properly categorized and offered [Forest Service] lands. . . . [and] to participate in a lawful [oil and gas leasing] process." The Ninth Circuit's decision is in direct an intolerable conflict with the Eighth Circuit's decision. This Court should grant *certiorari* to address this conflict.

3. The Ninth Circuit's Decision Denying Oil And Gas Companies Standing To Challenge Illegal Oil And Gas Leasing Decisions Now Makes Two Expansive Circuits Part Of A Growing And Troublesome Split Among The Circuits.

The Ninth Circuit's decision now extends to two vast Circuits a view of standing that bars oil and gas operators from challenging any and all federal oil and gas leasing decisions.

In *Marathon Oil Company v. Babbitt, et al.*, 166 F.3d 1221, 1999 WL 3362 (10th Cir. 1999) (unpublished), *cert. denied*, 528 U.S. 819 (1999), Marathon, like IPAA before the Ninth Circuit, brought an action asserting that the BLM unlawfully failed to offer federal lands for oil and gas leasing. The Tenth Circuit affirmed the district court's decision holding that Marathon lacked standing to challenge the BLM's leasing decision because "[o]nly an order of [the district court] compelling the executive branch to make land available for competitive leasing. . . . would likely redress Marathon's claimed injuries." *Id.* at 1 (citing, *Marathon Oil Co. v. Babbitt*, 966 F.Supp. 1024, 1026 (D. Colo. 1997)). Similarly, the Ninth Circuit held that IPAA had no right "to compel the Forest Service to authorize leasing of its land for mineral exploration." App. 3.

Although the Tenth Circuit's decision turned on "redressability" and the Ninth Circuit's decision on "injury in fact," the result of both decisions is the same: oil and gas operators may not challenge illegal federal oil and gas leasing decisions. Neither of these decisions can be reconciled with the Eighth Circuit's *Arkla* decision that those seeking to bid on oil and gas leases on federal land have the right and thus the standing to challenge the proposed leasing decisions for failure to comply with federal law. *Arkla*, 734 F.2d at 353-54.

The Ninth Circuit's decision is in direct conflict with the decisions of this Court and with an important decision of the Eighth Circuit; moreover, the Ninth Circuit's decision expands a growing and nationally significant split between the Circuit Courts. That split is nationally significant because much of the nation's future energy supplies will come from the federal lands within these circuits. If the men and women who explore for, discover, and produce that energy are unable to sue to ensure compliance with federal mineral and environmental laws, valuable energy resources could be placed off limits illegally.[6] This Court should grant *certiorari* to address these conflicts.

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[6] Although the Ninth and Tenth Circuits are but two of the nation's 13 federal circuits, they cover a vast area that encompasses 93.3 percent of all federal lands in the country and that includes an estimated 80 percent of all onshore gas reserves and a substantial portion of the Nation's onshore oil reserves. "Public Land Statistics 1999," U.S. Dept. Of The Interior, Bureau of Land Management; "Report of the National Energy Policy Development Group," May 2001, Ch 5, p. 10.

C. Parties Who Are The "Object of The Action" At Issue Have Standing.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), this Court held:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be . . . proved . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action . . . at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

Id. at 561. In this case, the sole "action . . . at issue" was the Forest Service's decision as to whether to authorize oil and gas leasing within the Lewis and Clark. In fact, the solitary reason why the Draft EIS, Final EIS, and ROD were prepared was to comply with the Forest Service's new obligation under the 1987 MLA amendments. Those documents addressed only whether oil and gas leasing would be permitted in the Lewis and Clark; thus, IPAA and its members, oil and gas operators, were the "object of the [Forest Service's] action." Moreover, because the Forest Service's no-leasing decision prohibited any and all "oil and gas leasing" within the entire Rocky Mountain Division, IPAA and its members were barred from bidding for oil and gas leases there. Therefore, IPAA and its members are the "object of the [Forest Service's] action" and "there is . . . little question that the action . . . caused [them] injury" and that they have standing to challenge that action. *Id.*

The Ninth Circuit's decision clearly conflicts with the holding of this Court in *Lujan*. This Court should grant *certiorari* to address this conflict.

II. THE NINTH CIRCUIT'S DECISION IS IN DIRECT AND INTOLERABLE CONFLICT WITH THE DECISIONS OF THIS COURT AND SEVERAL CIRCUIT COURTS REGARDING THE "ZONE OF INTERESTS" TEST.

This Court has made clear that an organization has prudential standing whenever the interest it seeks to protect is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). The zone of interests test is "not meant to be especially demanding." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987). A party need only demonstrate a "plausible relationship" between his interests and the policies to be advanced by the relevant section of the statute to meet the test. *Id.* at 399-400. In fact, a party's interest falls outside the "zone of interests" only if the interest is "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* The Ninth Circuit's decision that IPAA lacked prudential standing to raise a NEPA claim "because [IPAA's] interest in enforcing the statute is purely economic, and as such does not fall within NEPA's zone of interests," App. 3, is in conflict with these and other related holdings of this Court.[7]

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[7] The Ninth Circuit recognizes that parties who suffer injury to their concrete interests have standing to raise their "procedural right" under NEPA. *See, e.g., Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001). The Ninth Circuit implicitly recognized this fact: when it cited [*Lujan v. Defenders of Wildlife*, 504 U.S. 555,] 572 n. 7. App. 3. That footnote reads: "The person who has been accorded a procedural right to protect his concrete interests can assert that right without

A. Under This Court's Decision in *Bennett v. Spear*, An Organization With Purely Economic Interests Has Prudential Standing To Raise A NEPA Claim.

The Ninth Circuit's holding cannot be reconciled with this Court's decision in *Bennett v. Spear*, 520 U.S. 154, 163 (1997). In *Bennett*, water users filed suit against the U.S. Fish and Wildlife Service to challenge a biological opinion issued under the Endangered Species Act ("ESA") that resulted in a loss of their water rights. The Ninth Circuit held that the water users lacked prudential standing because their interest was mostly economic and "only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA." 63 F.3d 915, 919 (9th Cir. 1995) (emphasis in original). This Court granted *certiorari* and reversed. In so doing, this Court reaffirmed the principle that whether an interest is "arguably protected [or regulated] within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question . . . but by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175-76. The particular provision of the ESA at issue in *Bennett* was Section 7, which mandates that biological opinions be based upon "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). Although this Court recognized that one objective of this requirement was "to advance the ESA's overall goal of species preservation," the Court also found:

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meeting all the normal standards for redressability and immediacy." However, because the Ninth Circuit failed to recognize IPAA's injury in fact, the Ninth Circuit erroneously held that IPAA had no "procedural right to the proper administration of the various environmental laws." App. 3.

> another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.

520 U.S. at 177. Thus, this Court ruled that the water users' "economic interests" were arguably within the zone of interests protected or regulated by Section 7 of the ESA.

Similarly, IPAA's economic interests are arguably within the zone of interests protected or regulated by NEPA. For example, NEPA expressly mandates that federal agencies use "all practicable means and measures [to] create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, *economic,* and other requirements of present and future generations of Americans." 42 U.S.C. 4331(a) (emphasis added). NEPA also seeks to ensure the "widest range of beneficial uses of the environment." Moreover, the Council on Environmental Quality specifically requires federal agencies to analyze "economic" impacts if those impacts are interrelated with effects on the natural or physical environment. 40 C.F.R. § 1508.14. Thus, like the water users in *Bennett,* IPAA's economic interests arguably fall within the zone of interests protected or regulated by NEPA. Therefore, the Ninth Circuit's holding that "purely economic" interests "do[ ] not fall within NEPA's zone of interests" is in conflict with the holding of this Court in *Bennett.* This Court should grant *certiorari* to address this conflict.

B. The Eighth And Ninth Circuits Are Split As To Whether Purely Economic Interests Are Within NEPA's Zone Of Interests.

The Ninth Circuit's holding, that "purely economic" interests do not fall within NEPA's zone of interests, cannot be reconciled with the Eighth Circuit's decision in *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999). In *Friends*, commercial outfitters challenged a management plan that imposed restrictions on the number of motorboats within a wilderness area in the Superior National Forest in Minnesota. *Id.* at 1120. The District Court held that the outfitters lacked standing to assert any NEPA claims. On appeal, the Eighth Circuit reversed, holding that "the particular provisions [of NEPA] relied on by the outfitters indicate that the economic effects of proposed agency action must also be considered once it is determined that the proposed agency action significantly affects the physical environment." *Id.* at 1125.[8] The Eighth Circuit held further: "[t]he outfitters claim that they have standing because the Final EIS fails to consider adequately the economic impact on local economies. . . . These concerns are explicitly referenced in . . . NEPA . . . and in its implementing regulations." *Id.* at 1126. Finally, the Eighth Circuit held that the outfitters' economic interests fell within NEPA's zone of interests:

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[8] The Eighth Circuit relied on several specific provisions of NEPA, including § 4331(a), which requires federal agencies to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." *Id.* at 1126. (emphasis deleted). The Eighth Circuit also cited several CEQ regulations requiring federal agencies to examine, *inter alia*, the "economic" effects of agency action. *Id.*

> We need not consider whether the Outfitters are in fact more concerned with economics than with the welfare of the physical environment. Regardless of their true intent, they have standing to ensure that the agency adequately considers all of the statutorily referenced concerns when balancing the relevant factors in the Final EIS. . . . We hold that the Outfitters have standing to challenge the Final EIS on the grounds stated in their complaint because these claims are arguably within the zone of interests protected by NEPA.

Id. at 1127.

The Ninth Circuit's decision is in direct and intolerable conflict with the Eighth Circuit's decision in *Friends*. This Court should grant *certiorari* to address this conflict.

III. THE NINTH CIRCUIT'S DECISION IS IN DIRECT AND INTOLERABLE CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS AS TO WHETHER AGENCY DECISION-MAKING MAY BE BASED ON ATTENUATED "PSYCHOLOGICAL HARMS" WHEN THERE IS NO CHANGE IN THE PHYSICAL ENVIRONMENT.

In *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), this Court granted *certiorari* to determine whether purported "psychological harms" are cognizable under NEPA. In that case, the Nuclear Regulatory Commission ("NRC") authorized restart of a nuclear power plant without considering the purported "psychological harms" caused by the risk of an accident at the plant. An organization of residents living in the area claimed that NEPA required the NRC to consider these "harms" before authorizing the restart of the plant.

This Court held, however, that these purported "harms" are not cognizable under NEPA. *Id.* at 771. Although this Court noted that the "effects on human health can be recognizable under NEPA, and that human health may include psychological health," *Id.*, this Court interpreted the statutory language of NEPA to require "a reasonably close causal relationship between a change in the physical environment and the effect at issue." *Id.* at 774. With respect to the organizations' purported "psychological harms," it found no such relationship:

> [The organization] argues that the psychological health damage it alleges "will flow directly from the risks of [a nuclear] accident." . . . But a *risk* of an accident is not an effect on the physical world. In a causal chain from renewed operation of . . . [the nuclear reactor] to psychological health damage, the element of risk and its perception by [the organization] are necessary middle links. We believe that the element of risk lengthens the causal chain beyond the reach of NEPA.

Id. at 775. (emphasis in original). This Court also stressed that if NEPA required the consideration of psychological harms caused by a risk, it would place an unmanageable burden on federal agencies:

> If contentions of psychological health damage caused by risk were cognizable under NEPA, agencies would, at the very least, be obliged to expend considerable resources developing psychiatric expertise that is not otherwise relevant to their congressionally assigned functions. The available resources may be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources.

Id. at 776.

Finally, this Court stated that purported psychological harm based upon risk raised policy questions that fell outside of NEPA:

> Neither the language nor the history of NEPA suggest that it was intended to give citizens a general opportunity to air their policy objections to proposed federal actions. The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements. . . . It would be extraordinarily difficult for agencies to differentiate between "genuine" claims of psychological health damage and claims that are grounded solely in disagreement with a democratically adopted policy.

Id. at 777-778. Thus, under *Metropolitan Edison*, only psychological harms that arise "out of [1] the direct sensory impact of [2] a change in the physical environment" are cognizable under NEPA. *Id.* at (Brennen, J., concurring).

The Second and Eighth Circuits have followed the teachings of *Metropolitan Edison*. *New York v. United States Dep't Transportation*, 715 F.2d 732, 751 (2nd Cir. 1983) ("fear is not a cognizable environmental impact under NEPA");[9] *Olmsted Citizens for a Better Community v. U.S.*, 793 F.2d 201, 204 (8th Cir. 1986) (fear of the risk of increased criminal activity not cognizable under NEPA). In the instant case, however, the Ninth Circuit turned this

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[9] Recently, the Second Circuit reaffirmed its adherence to *Metropolitan Edison* in *Cellular Phone Taskforce v. Federal Communications Comm'n*, 205 F.3d 82, 95 (2nd Cir. 2000) ("NEPA only requires agencies to consider environmental effects, *i.e.*, alterations to the environment that have a proximate effect on human health.")

Court's decision in *Metropolitan Edison* on its head and, thereby, created a split in the circuits.[10]

The Forest Service determined that oil and gas leasing in the Lewis and Clark would have no adverse impacts on the environment. ROD at 5 ("oil and gas exploration and development can take place in this area without significant negative impacts to wildlife or other surface resources"). Notwithstanding this determination, the Forest Service prohibited oil and gas leasing because:

> A majority of the *concerns*, however, were expressed regarding the "value of place," speaking in particular to social and personal values attributed to the Front. It is clear that this is a very unique and special place to many people; both those who live here in Montana as well as those who have visited or only heard about the area. Many of those who commented during the process admitted they have not read the environmental analysis and many may not fully understand – or care to understand – the analysis. They simply want to express *heartfelt*

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[10] Ironically, prior to the decision in the instant case, the Ninth Circuit had properly followed *Metropolitan Edison*. For example, in *Animal Lovers Volunteer Ass'n v. Weinberger*, 765 F.2d 937 (9th Cir. 1985), an animal rights group sued the Navy under NEPA for failing to consider the purported psychological harm that the Navy's killing of feral goats had on its members. Noting that the members of the animal rights group lacked access to the naval property on which the killing occurred, the Ninth Circuit ruled: "the NEPA zone of interests does not create a cause of action in persons claiming a psychological impact from a particular action . . . , unless, perhaps, the psychological injury arises out of the direct sensory impact of a change in the [members'] physical environment." *Id.* at 938 (quoting *Metropolitan Edison*, 460 U.S. 766, 778 (1983) (Brennen, J., concurring).

> *emotions* about a place they consider special. Many *feel* that development of any kind, particularly oil and gas development, would "ruin" the *special feeling* of the Front, *regardless of whether they ever saw or experienced the results of development*. Their *perceptions* about the *value and spirituality of a place* would be affected. Many *feel* that relatively undeveloped lands such as those on the Front are a diminishing resource, and increasingly hard to find. They point to its uniqueness in that sense. They also *feel* the need for oil and gas does not outweigh the intrinsic values of the lands in and along the Rocky Mountain Front.

ROD at 5 (emphasis added). Thus, in making its decision, the Forest Service considered the purported "psychological harm" not only as to events that would not change the physical environment but also as to persons who may never visit the Lewis and Clark.

The Ninth Circuit upheld the Forest Service's decision-making process by ruling, "psychological effects of an agency's decision may be considered under NEPA." App. 3. This Court, however, ruled in *Metropolitan Edison* that an agency may consider only "psychological harm" that arises "out of [1] the direct sensory impact of [2] a change in the physical environment." 460 U.S. at 779 (Brennan, J., concurring). In the instant case, there was a zero percent chance "of a change in the physical environment" because oil and gas leasing in the Lewis and Clark would have no adverse impacts on the environment. ROD at 5. Even if such a "change" did occur, it would not have a "direct sensory impact" on the majority of those opposing oil and gas leasing because they had no plans to visit the area: "Many feel that development of any kind, particularly oil and gas development, would ruin the special feeling of the Front, regardless of whether they

ever saw or experienced the results of development." *Id.* As a result, it is impossible for the purported "psychological harm" to arise "out of the direct sensory impact of a change in the physical environment."[11] Thus, the Ninth Circuit's decision is in direct conflict with *Metropolitan Edison*. This Court should grant *certiorari* to address this conflict.

CONCLUSION

The Ninth Circuit's decision is in direct and intolerable conflict with the decisions of this Court and the decisions of several Circuit Courts. This Court should grant *certiorari* to address these conflicts.

Respectfully submitted,

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[11] Thus, through its improper application of *Metropolitan Edison*, the Ninth Circuit sanctions two additional violations of federal law. First, by permitting consideration of the alleged "psychological harms" of those distant from the site of proposed federal action, the Ninth Circuit has turned NEPA in little more than a vote-counting contest. Second, by permitting "psychological harms" to be considered by the Forest Service under NEPA, the Ninth Circuit has allowed the Forest Service to circumvent NFMA, under which "psychological harms" are not cognizable.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROCKY MOUNTAIN OIL & GAS ASSOCIATION, Plaintiff, and INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, Plaintiff-Intervenor-Appellant, v. UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture; Defendant-Appellee, and MONTANA WILDERNESS ASSOCIATION; PROFESSIONAL WILDERNESS OUTFITTERS; BACK COUNTRY HORSEMEN OF MONTANA; THE WILDERNESS SOCIETY, INC.; SIERRA CLUB; MONTANA AUDUBON; NATIONAL WILDLIFE FEDERATION; KAA MO TAAN; GEORGE ENGLER, Defendant-Intervenors-Appellees.	No. 00-35349 D.C. CV-98-00022-CCL MEMORANDUM* (Filed May 3, 2001)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted April 2, 2001
Seattle, Washington

Before: THOMPSON, TROTT and PAEZ, Circuit Judges.

The Independent Petroleum Association of America ("IPAA") appeals the district court's grant of summary judgment in favor of the U.S. Forest Service. IPAA challenges the Forest Service's decision not to offer particular lands within the Lewis & Clark National Forest for oil and gas leasing, asserting claims under the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321-4370e (1994 & Supp. IV 1998), National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600, 1611-1614 (1994), Multiple-Use Sustained Yield Act ("MUSYA"), 16 U.S.C. §§ 528-531 (1994) and the Establishment Clause. The district court decided in favor of the Forest Service, holding that IPAA lacked standing to sue, and that it failed to establish that the Forest Service's decision was arbitrary, capricious or in violation of any law. We affirm on the basis that IPAA lacks standing to bring its NEPA, NFMA and MUSYA claims, all of which are brought under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (1994), and that its Establishment Clause claim lacked merit.

IPAA lacks Article III standing for its NEPA, NFMA and MUSYA claims because the Forest Service has discretion whether to authorize the leasing of any particular Forest Service lands for mineral exploration. *See* 30 U.S.C. § 226(h) (1994); 36 C.F.R. §§ 219.10-219.12 (2000); 36 C.F.R. § 228.102(e) (2000). Because the statute gives the Forest

Service this discretionary power, IPAA has no "right" to bid for leases on any Forest Service land or to compel the Forest Service to authorize leasing of its land for mineral exploration. Lacking such a right, IPAA suffered no injury in fact as a result of the Forest Service's decision not to lease land in the Rocky Mountain Division. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The absence of such a right also forecloses IPAA's argument that it has a procedural right to the proper administration of the various environmental laws. *See id.* at 572 n.7. We also note that IPAA lacks prudential standing on its NEPA claims because its interest in enforcing the statute is purely economic, and as such does not fall within NEPA's zone of interests. *See Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1157-58 (9th Cir. 1998).

IPAA contends the Forest Supervisor acted arbitrarily, in violation of the APA, in deciding not to lease the land because, in making that decision, she relied upon the Rocky Mountain Division's "value of place." IPAA styles this as an "ultra vires" claim, alleging that the Forest Supervisor acted outside of her authority. We reject this contention. The Forest Supervisor acted within her authority and in a non-arbitrary manner: the psychological effects of an agency's decision may be considered under NEPA, *cf. Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 771-75 (1983), and the Supervisor had a reasoned basis for her decision.

In support of its Establishment Clause claim, the IPAA argues that the Forest Service's decision not to lease the land was based on the current use of the land for Native American religious practices. This argument fails.

The Forest Service's decision not to lease the land satisfies the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). First, the Forest Service's decision had a secular purpose: the agency considered many secular factors, such as public concern about "value of place," impacts to wildlife and other surface resources, tourism and recreational uses and preservation of options for future use. Second, the primary purpose and effect of the decision not to lease was to protect the Rocky Mountain Division from oil and gas exploration, not to advance Native American religious beliefs. Third, the decision not to lease does not foster excessive entanglement with religion. Moreover, the government may, consistent with the Establishment Clause, accommodate religious practices in its decision-making processes. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453-54 (1988); *Hobbie v. Unempl. Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987).

Nor does the Forest Service's decision violate the endorsement test of the Establishment Clause because, given the many secular considerations cited in the Forest Service's Record of Decision, a "reasonable observer" would not view the decision as an endorsement of religion. *See Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778-79 (1995) (O'Connor, J., concurring).

AFFIRMED.

A TRUE COPY
CATHY A CATTERSON
Clerk of Court

ATTEST

JUN 26 2001

by: /s/ [Illegible]
Deputy Clerk

JUDGMENT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 00-35349
CT/AG#: CV-98-00022-CCL

(Filed Jun. 29, 2001)

ROCKY MOUNTAIN OIL & GAS ASSOCIATION

Plaintiff

and

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA

Plaintiff-Intervenor-Appellant

v.

UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture;

Defendant-Appellee

and

MONTANA WILDERNESS ASSOCIATION; PROFESSIONAL WILDERNESS OUTFITTERS; BACK COUNTRY HORSEMEN OF MONTANA; THE WILDERNESS SOCIETY, INC.; SIERRA CLUB; MONTANA AUDUBON; NATIONAL WILDLIFE FEDERATION; KAA MO TAAN; GEORGE ENGLER

Defendant-Intervenors-Appellees

APPEAL FROM the United States District Court for the USDC – Helena, Montana.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the USDC – Helena, Montana and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered: May 3, 2001

A TRUE COPY
CATHY A CATTERSON
Clerk of Court

ATTEST

JUN 26 2001

by: /s/ [Illegible]
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

* * *

ROCKY MOUNTAIN OIL & GAS ASSOCIATION

Plaintiff,

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,

Plaintiff-Intervenor,

-v-

UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture,

Defendant,

PROFESSIONAL WILDLIFE OUTFITTERS, et al.,

Defendant-Intervenors.

CV 98-22-H-CCL

OPINION AND ORDER

(FILED MAR 7 2000)

* * *

Before the court are the parties' cross-motions for summary judgment. The matter came on for hearing on February 17, 2000, and the case was argued by Charles Kaiser for the Plaintiff, by William Thode for Plaintiff-Intervenor, by Albert Lin for Defendant, and by James Angell for Defendant-Intervenors. The court, having heard oral argument and having carefully reviewed the briefs and the materials submitted by the parties, is prepared to rule.

Plaintiffs's "Complaint for Review of Administrative Action and for Declaratory Relief," filed May 21, 1998, asserts that the Record of Decision (ROD) issued by Defendant United States Forest Service ("Forest Service") is an unlawful agency decision violating the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 *et seq.*, the Multiple-Use Sustained Yield Act ("MUSYA"), 16 U.S.C. §§ 528-531, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 501 *et seq.* Plaintiffs ask that the court declare the Forest Service decision not to issue oil and gas leases in the Rocky Mountain Division of the Lewis and Clark National Forest, effective for the next 7-12 years, to be violative of NEPA, NFMA, and MUSYA, and to be arbitrary, capricious and not in accordance with the law, in violation of the APA.

Standing

Defendant USFS and Defendant-Intervenors challenge Plaintiff and Plaintiff-Intervenor's standing to bring this action. Both Plaintiffs are trade associations whose members want the opportunity to obtain oil and gas leases in the Rocky Mountain Division.[1] The Defendants urge the court to take the view that Plaintiffs can show no injury in fact that could be redressed by a favorable decision. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1012-16 (1998).

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[1] The Forest Service decision does not affect existing leases. AR Vol. 14, Doc. 1 at I-7 (FEIS).

Defendants' main point is that this court is unable to order the executive branch to issue oil and gas leases on the Rocky Mountain Division to Plaintiffs and that therefore no substantial likelihood exists that Plaintiffs' complaints can be redressed. *See* 30 U.S.C. § 226(a) (Mineral Leasing Act) ("All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits *may* be leased by the Secretary [of the Interior]." (emphasis added)). *See also Udall v. Tallman*, 380 U.S. 1, 4 (1965); *Arnold v. Morton*, 529 F.2d 1101, 1105 (9th Cir. 1976); *Burglin v. Morton*, 527 F.2d 485, 488 (9th Cir. 1975) (Secretary [of Interior] not obligated to issue oil and gas leases on government lands); 30 U.S.C. § 226(h) (Secretary of Interior may not lease land without consent of Secretary of Agriculture). Defendants also point out that a third-party not before the court, the Secretary of the Interior, exerts control over whether oil and gas leases are issued in the Rocky Mountain Division. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (redressability not met when third party not before court controls issue).

Finally Defendants assert that prudential standing is absent because Plaintiffs have failed to identify precisely how they have been aggrieved under the APA within the meaning of a relevant statute. In this regard, Defendants argue that economic interests are not within the zone of interests of NEPA. *See Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1157 (9th Cir. 1998).

Merits of Plaintiffs' Complaints

Because the question of standing is intertwined with the merits of the case, the court considers both simultaneously.

Plaintiffs' argument under NEPA is essentially that it is unlawful for the Forest Service to allow public sentiment to override scientific approval of oil and gas leasing in the Rocky Mountain Division. This would be an odd rule of law to ascribe to NEPA, which has the goal of providing notice to the public of proposed agency action and an opportunity for public input. 42 U.S.C. § 4332(c); 40 C.F.R. § 1500.2(d) *Half Moon Bay Fishermans' Mktg. Ass'n*, 857 F.2d 505, 508 (9th Cir. 1988). While it is true that NEPA does not require agencies to obey public opinion, it is equally true that nothing in NEPA forces agencies to submit blindly to the proposals of agency scientists and technical staff. *See e.g., California v. Block*, 690 F.2d 753, 774 (9th Cir. 1982); *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 488-89 (D.C. Cir. 1986).

Additionally, Plaintiffs' arguments that the "value of place" criterion was treated inconsistently in the FEIS as opposed to the ROD and that "value of place" is not a valid management criterion boil down to semantics, and are disingenuous at best. Plaintiffs also assert that they should have been given an opportunity to comment upon public comment, as if Plaintiffs occupied some middle strata between the public and the agency.

From the beginning of the scoping process in 1994, the public has been overwhelmingly concerned with the value of the place, i.e., the Rocky Mountain Division of the Lewis and Clark National Forest. The "value of place"

criterion is also inextricably part of recreation and tourism criteria. As Plaintiffs themselves point out, the majority of people commenting upon the DEIS did not want even the possibility of oil and gas technology spoiling the pristine scenery and diverse resources of the Rocky Mountain Division. Plaintiff-Intervenor's attempt to elevate these strong feelings about the place to a new age religion and then to call foul on the basis of violation of the Establishment Clause is simply without merit.[2]

There is nothing arbitrary and capricious or unlawful under NEPA arising from the Forest Service decision not to open the Rocky Mountain Division to oil and gas leasing because the agency gave the question a sufficiently hard look and considered public opposition and many other relevant factors. The ROD shows that the agency examined the relevant data, and the ROD articulates a rational explanation[3] for agency action. *See Motor*

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[2] Plaintiff-Intervenor's Establishment Clause argument and its ultra vires argument were not raised in the administrative appeals process and should be dismissed on failure to exhaust administrative remedies.

[3] The court will not attempt to articulate each and every basis upon which the decision rests, but the ROD lists the following factors to support the decision: (1) public comment; (2) information disclosed in the Final EIS; (3) presence of an identified traditional cultural district; (4) fact that two leaseholders presently willing to consider exchanging lease rights for offshore lease bidding credits; (5) Department of Energy projection that combined domestic and important natural gas supplies expected to keep pace with demand for next 15-20 years; (6) social values; (7) non-monetary or other use values; (8) revenue from tourism and recreational uses; (9) preservation of options for future use (whether for wilderness designation or multiple uses). Plaintiffs argument that the

Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Plaintiffs' arguments under the NFMA and the MUSYA are irrelevant as the NFMA and the MUSYA do not apply to oil and gas leasing and because Amendment 21 to the 1986 Forest Plan was a non-significant amendment not requiring preparation of an environmental impact statement.

Arbitrary and capricious review cannot be conducted under the APA independent of another statute. *Oregon Natural Resources Council v. Thomas*, 92 F.3d 797, 797 (9th Cir. 1996). Here there is no such statute.

Conclusion

Having reviewed the administrative record, the briefs, declarations, and affidavits of all parties, and having heard oral argument, the court finds a lack of standing to sue and failure to establish that the agency's decision was arbitrary, capricious, or in violation of any law.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's motion for summary judgment (#53) and Plaintiff-Intervenor's motion for summary judgment (#50) are both DENIED. Defendant's cross-motion for summary judgment (#62) and Defendant-Intervenor's cross-motion for summary judgment (#59) are both GRANTED.

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decision was based on only one factor, "value of place," is simply false.

IT IS FURTHER ORDERED that Plaintiff's' complaint and Plaintiff-Intervenor's complaint are both DISMISSED, and all relief is DENIED. Let judgment enter accordingly.

The Clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 7th day of March, 2000.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

UNITED STATES DISTRICT COURT

HELENA DIVISION DISTRICT OF MONTANA

ROCKY MOUNTAIN OIL & GAS ASSOCIATION,

Plaintiff,

V.

UNITED STATES FOREST SERVICE,

Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **CV-98-22-H-CCL**

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

Plaintiff's motion for summary judgment and Plaintiff-Intervenor's motion for summary judgment having been DENIED, and Defendant's cross-motion for summary judgment and Defendant-Intervenor's cross-motion for summary judgment having been GRANTED,

IT IS HEREBY ORDERED AND ADJUDGED the Plaintiff's complaint and Plaintiff-Intervenor's complaint are both DISMISSED, that the parties take nothing thereby, and that all relief is DENIED.

March 7, 2000
Date

LOU ALEKSICH, JR.
Clerk

DIANNE E. MANTZ
(By) Deputy Clerk

The Constitution of the United States of America; Article III, Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [or] the laws of the United States . . . [and to] Controversies to which the United States shall be a Party. . . .

Administrative Procedures Act (APA), 5 U.S.C. § 551, *et seq.*

§ 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321, *et seq.*

§ 4321 Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; . . .

§ 4331. Congressional declaration of national environmental policy

(a) Creation and maintenance of conditions under which man and nature can exist in productive harmony

The Congress . . . declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means [to] . . .

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

. . . and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action, [and]

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. . . .

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

National Forest Management Act of 1976 (NFMA), 16 U.S.C. § 1600, *et seq.*

§ 1604. National Forest System land and resource management plans

(a) Development, maintenance, and revision by Secretary of Agriculture as part of program; coordination

As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management

planning processes of State and local governments and other Federal agencies.

(b) Criteria

In the development and maintenance of land management plans for use on units of the National Forest System, the Secretary shall use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.

* * *

(d) Public participation in management plans; availability of plans; public meetings

The Secretary shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.

* * *

(g) Promulgation of regulations for development and revision of plans; environmental considerations; resource management guidelines; guidelines for land management plans

As soon as practicable, but not later than two years after October 22, 1976, the Secretary shall . . . set out the process for the development and revision of the land

management plans, and the guidelines and standards prescribed by this subsection.

* * *

§ 1612. Public participation

(a) Adequate notice and opportunity to comment

In exercising his authorities under this subchapter and other laws applicable to the Forest Service, the Secretary by regulations, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs.

LEWIS AND CLARK NATIONAL FOREST OIL AND GAS LEASING

FINAL ENVIRONMENTAL IMPACT STATEMENT

RECORD OF DECISION

Lewis and Clark, Teton, Pondera, Glacier, Cascade, Chouteau, Meagher, Park, Judith Basin, Wheatland, Fergus, Musselshell, Golden Valley, and Sweetgrass Counties

MONTANA

Prepared by:

U.S. DEPARTMENT OF AGRICULTURE – FOREST SERVICE
LEWIS AND CLARK NATIONAL FOREST
R-1, NORTHERN REGION

U.S. DEPARTMENT OF INTERIOR – BUREAU OF LAND MANAGEMENT
MONTANA STATE OFFICE

August 28, 1997

[1] I. INTRODUCTION

Purpose and Description of the Record of Decision (ROD)

This ROD documents the Forest Service decisions concerning which lands will be administratively available for oil and gas leasing in accordance with 36 CFR 228.102(d) and which lands specifically the Forest Service is authorizing the BLM to offer for lease in accordance with 36 CFR 228.102(e) and Forest Service policy.

The Mineral Leasing Act of 1920 (as amended) provided that all public lands are open to oil and gas leasing, unless a specific land order or law has been issued to

close an area. The Federal Onshore Oil and Gas Leasing Reform Act was enacted by Congress in 1987 and gave the Secretary of Agriculture additional responsibilities for leasing decisions. Implementing regulations for the U.S. Department of Agriculture at 36 CFR 228 and the Department of Interior at 43 CFR 3100 were finalized and published in the Federal Register on March 21, 1990, and June 17, 1988, respectively. The regulations set forth the procedures by which the Forest Service and the Bureau of Land Management (BLM) will carry out their statutory responsibilities in the issuance of oil and gas leases.

These decisions incorporate the lease terms and stipulations determined necessary to mitigate effects to surface resources. These measures are based on analyses documented in the Lewis and Clark National Forest Oil and Gas Leasing Final Environmental Impact Statement (Final EIS) and the Lewis and Clark National Forest Land and Resource Management Plan (Forest Plan).

These decisions were guided by the results of a comprehensive analysis that considered the cumulative effects of activities on the current and future resources, economics, and social patterns of this highly sensitive area. Also considered was a great deal of public comment expressed both in favor of and against leasing in the Lewis and Clark National Forest; comments received not only at this time, but also over the past two decades on this issue. Although this input may not necessarily reflect the opinion of all affected or interested people, these decisions attempt to balance the conflicting viewpoints and resource concerns.

Decisions of this nature, which may have a lasting effect on a very significant area, do not come easily. Oil and gas leasing, and subsequent actions, have been a contentious issue, particularly on the Rocky Mountain Division; an area considered to have high potential for significant hydrocarbons resources while also valued for its wildlife, recreational, cultural and aesthetic qualities. The fact the area in question is held in the highest regard by many people who have never even seen it, makes decisions of this nature even more difficult. As such, none of the pertinent information or substantive comments were taken lightly; all of this information figured into the final analysis in some way. It is important for the reviewer to know these factors were closely considered in the attempt to arrive at a decision which is a balance between conflicts, public opinion, opportunities, supply and demand, resource capability, and the needs of future generations.

This ROD also documents the Forest Service decision to amend the Lewis and Clark National Forest Plan regarding which lands are administratively available for oil and gas leasing and where the Selected Alternative differs from the Forest Plan Standards or Management Direction.

This ROD documents the BLM decision to use the Final Lewis and Clark National Forest Oil and Gas Leasing Environmental Impact Statement as its National Environmental Policy Act (NEPA) compliance document for: 1) offering lands for lease within the Jefferson Division of the Lewis and Clark National Forest subject to stipulations identified in this ROD, and 2) making private surface/federal minerals within the administrative boundaries of the Jefferson Division of the Lewis and Clark National Forest open for oil and gas leasing.

Purpose and Need for the Action

The purpose and need of this project is, first, to comply with Congressional intent. In response to the Leasing Reform Act, and in accordance with 36 CFR 228.102, the Forest Service must determine which lands in the Lewis and Clark National Forest are administratively available for oil and gas leasing, and determine which [2] specific lands in the Lewis and Clark National Forest the Forest Service will authorize the BLM to offer for lease. The detailed purpose and need for this analysis can be found in the Final EIS on pages 1-7 and 8.

Geographic Scope

The geographic scope of the analysis area for determination of both the Availability Decision and the Leasing for Specific Lands decision is identified by the boundaries shown on the accompanying maps. The area contains all of the lands administered by the Lewis and Clark National Forest. The area is located in portions of Lewis and Clark, Teton, Pondera, Glacier, Cascade, Chouteau, Meagher, Park, Judith Basin, Wheatland, Fergus, Musselshell, Golden Valley, and Sweetgrass Counties in Central Montana. Within the analysis area there are 1,829,609 acres with Federal jurisdiction of surface use and Federal jurisdiction of minerals. There are an additional 32,966 acres of split estate lands and outstanding mineral reserved rights for oil and gas.

II. DECISIONS AND RATIONALE FOR THE DECISIONS

I have selected from two alternatives displayed in the Final EIS for the availability and leasing decisions. I am selecting Alternative 1(a) for the Rocky Mountain Division. No lands on the Rocky Mountain Division will be offered for lease. Map II-1 displays Alternative 1(a) for the Rocky Mountain Division. I am selecting Alternative 7 for the Jefferson Division. Certain lands on the Jefferson Division will be offered for lease with stipulations to protect resource values. Map II-16 displays the areas that will be offered for lease and the stipulations that will apply on the Jefferson Division.

Under the implementing regulations, the Forest Service has two decision points relating to oil and gas leasing. In this instance, the Forest Service has decided to combine the Lands Administratively Available Decision, with the Leasing of Specific Lands Decision. Both of these decisions are documented in this Record of Decision. Once these decisions have been made, the Forest Service will have authorized the BLM to offer specific lands for lease subject to appropriate stipulations. After the lands have been leased, the lessee can file an Application for Permit to Drill (APD). An APD must go through further site-specific NEPA analysis and decisionmaking (36 CFR 228.105-109).

The Leasing Reform Act of 1987 modified the authorities of the Secretaries of Interior and Agriculture. The Forest Service developed implementing regulations which defined the procedures to be used and established the

foundation for decision-making. The Final Rule was published in the Federal Register on March 21, 1990 (36 Code of Federal Regulations, Part 228, 100 et seq; 55 FR 10423).

As we continue discussions in this document we will refer to 228.102 (d), as the Availability Decision, and the 228.102 (e), as the Leasing for Specific Lands decision. Both of these decisions must occur prior to the time the BLM offers specific National Forest System lands for lease.

The following text describes this decision process.

* * *

[4] *B. LEASING DECISION – 36 CFR 228.102(E) – Leasing for Specific Lands Decisions*

The Availability Decision and the Leasing Decision are related to each other in that the leases authorized will be on lands earlier found to be Administratively Available for Leasing, and each lease will include the stipulations determined to be necessary in the specific leasing decision.

I have reviewed the availability decision on which lands are administratively available for leasing and authorize the BLM to offer specific lands for lease subject to:

1. Verifying oil and gas leasing on the specific lands has been adequately addressed in a NEPA document, and is consistent with the Forest Plan.

2. Ensuring conditions of surface occupancy identified in Section 228.102(c)(1) are properly included as stipulations in resulting leases.

3. Determining operations and development could be allowed somewhere on each proposed lease, except where stipulations will prohibit all surface occupancy.

In this decision, the Forest Service does make specific decisions to authorize leases on individual, specified areas of land.

Lands Available but Not Offered for Lease at this Time and Rationale for Decision

Regulations under 36 CFR 228.102(e) allow the Forest Service to authorize the BLM to offer *specific* lands for lease. The regulations do not obligate the Forest Service to offer all administratively available lands for lease. The options to the Forest Service include lease all *available* lands, or NOT lease any of the available lands, or to lease some specific lands at this time with varying stipulations to protect federal resources.

Based on public comment and the information disclosed in the Final EIS, I am selecting Alternative 1(a) for the leasing decision on the Rocky Mountain Division and Alternative 7 for the leasing decision on the Jefferson Division. My decision is to NOT LEASE the following administratively available lands at this time:

- **The entire Rocky Mountain Division.** The presence of an identified traditional cultural district in the RM-1 Geographic Unit (also known as the Badger-Two Medicine area), and potential impacts to this area from oil and gas leasing and development, are compelling reasons to not offer this geographic unit for lease. In addition, most of this area

is presently under lease. The terms of these leases have been suspended by the Bureau of Land Management pending review of the information regarding traditional cultural uses in the area. The existing leases have between 3 and 7 years remaining on their 10-year terms once the suspension is lifted. Two leaseholders have entered into discussions with the Department of Interior in regards to the possibility of trading out of lease rights in the Badger-Two Medicine. Chevron and FINA have indicated that they would be willing to consider accepting bidding credits on offshore leases in exchange for their lease rights in the Badger-Two Medicine. While discussions involving such possibilities are by no means close to being final, the fact that such action is being considered is also compelling reason not to lease these lands in the near future.

The vast majority of those responding to the Draft EIS were strongly against any development for the purposes of oil and gas exploration in the Lewis and Clark National Forest, particularly on the [5] Rocky Mountain Front (the Front), which is within the Rocky Mountain Division. Concerns expressed include potential impacts to wildlife and other surface resources. A majority of the concerns, however, were expressed regarding the "value of place," speaking in particular to social and personal values attributed to the Front. It is clear that this is a very unique and special place to many people; both those who live here in Montana as well as those who have visited or only heard about the area. Many of those who commented during

the process admitted they have not read the environmental analysis and many may not fully understand – or care to understand – the analysis. They simply want to express heartfelt emotions about a place they consider special. Many feel that development of any kind, particularly oil and gas development would "ruin" the special feeling of the Front, regardless of whether they ever saw or experienced the results of development. Their perceptions about the value and spirituality of a place would be affected. Many feel that relatively undeveloped lands such as those on the Front are a diminishing resource, and increasingly hard to find. They point to its uniqueness in that sense. They also feel the need for oil and gas does not outweigh the intrinsic values of the lands in and along the Rocky Mountain Front. Indeed, while the Department of Energy projects an increase in natural gas consumption over the next XV-XX years, combined domestic and imported natural gas supplies are expected to keep pace with this demand.

This analysis, as well as other previous analyses addressing oil and gas issues on the Rocky Mountain Division, show that limited and closely controlled oil and gas exploration and development can take place in this area without significant negative impacts to wildlife or other surface resource values. I also understand that oil and gas technologies have made significant advances in reducing impacts to sensitive areas such as the Rocky Mountain Division, and I expect that these technologies will continue to improve in the future. But, the effects of such activities on

social values and human needs and desires are much more difficult to quantify or describe. These difficult concepts have been at the crux of the issue regarding management and uses (particularly oil and gas leasing and development) along the Rocky Mountain Front for many years. The Forest has tried to recognize these social and emotional values and they have figured prominently in my decision not to lease the Rocky Mountain Division. I have considered social values as well as scientific values and recognize the importance of both. There are many disparate viewpoints on the subject of oil and gas leasing and development along the Rocky Mountain Front. It would be an impossible task to please all points of view on this subject.

I recognize that the Rocky Mountain Division has high potential for the occurrence of hydrocarbons, even though there are differing opinions on specific estimates of the amount of hydrocarbon resources. Development of these resources could provide economic benefits to local economies as well as the State of Montana and Federal Government. Some have contended that not allowing oil and gas development on National Forest System lands on the Front will mean that development on adjacent private lands is less attractive and potential revenues from private drilling may be lost. I realize that possible oil and gas revenue has been an important consideration for the State of Montana, as well as some local communities, who are looking for new or additional revenue sources to the economy. It could also be

argued that non-monetary or other use values are higher, however, and could result in more revenue from tourism and recreational uses, over time, than alternatives that allow oil and gas development. These, too, are difficult comparisons to make.

The argument has been made that not allowing leasing on the Rocky Mountain Division does not meet Congressional intent for mineral leasing or Forest Service mineral policy. Forest Service mineral policy in relation to minerals management is to encourage, facilitate, and administer the orderly exploration, development, and production of mineral and energy resources on National Forest System lands to help meet the present and future needs of the Nation. It is also policy to ensure the integration of mineral resources through the land and resource management planning process. The analysis documented in the Final EIS is part of that planning process. While my decision will not offer the Rocky Mountain Division for lease at this time, these lands have not been withdrawn nor made administratively unavailable for leasing. In addition, lands on the Jefferson Division identified as having moderate potential for the occurrence of oil and gas would be offered for lease with stipulations.

[6] From the number and context of most of the comments I have received, I feel not leasing the Rocky Mountain Division at this time will preserve options for future use of these lands, whether that be for wilderness designation or other multiple uses. By keeping these lands as administratively available, I

am not foreclosing future options for reconsidering this leasing decision should the need arise. The temporal scope of this analysis is considered to be 10 to 15 years, similar to most other planning documents. The Forest Service has the opportunity to review this analysis and decision any time conditions change from the present.

- **Inventoried lands adjacent to Wilderness Study Act areas**. These are lands that border wilderness study areas in the Big Snowy Mountains and Middle Fork Judith River in the Little Belt Mountains. These lands were analyzed, along with lands identified in the 1977 Montana Wilderness Study Act, as to their suitability for wilderness inclusion. While the Lewis and Clark Forest Plan did not recommend these lands for wilderness, Forest Plan direction is to manage them so as to maintain their wilderness character pending final Congressional action. For this reason, I will not authorize leasing on these adjacent inventoried roadless lands at this time. Because exact boundaries of some of these areas have not been finalized, I have included small acreages of land that may or may not be part of the inventoried roadless area. In addition, I have decided not to lease the road corridor leading to the Crystal Lake recreation area in the Big Snowy Mountains. This road corridor is fairly confined with limited occupancy opportunities and receives high recreational use. I feel oil and gas development in this corridor is not compatible with existing uses.

- **River segments considered to be eligible for "wild river" designation under the Wild and Scenic Rivers Act.** Consistent with present Forest Plan direction, these river segments will not be offered for lease at this time.

I feel that it is not appropriate to consider offering these lands for leasing at this time for the reasons stated. However, if the situation changes in the future, I will reconsider this decision. I will do this through the appropriate NEPA documentation that will include public involvement and an analysis to determine appropriate stipulations to include to provide the needed surface resource protection.

This decision will apply to lands currently under lease *when those leases terminate or expire.*

* * *

[1] SUMMARY

PURPOSE OF THIS EIS

The Environmental Impact Statement (EIS) analyzes what lands in the Lewis and Clark National Forest (Forest) could be available under certain conditions for leasing and subsequent oil and gas exploration and development. It describes alternatives and discloses and evaluates potential effects on the environment, other resources, and resource development opportunities.

PROPOSED ACTION

The Forest Service proposes to implement the management direction found in the 1986 Lewis and Clark

National Forest Plan. Under current Forest Plan direction, 1,231,632 acres would be available for oil and gas leasing. These lands would be available subject to constraints and management direction found in the plan.

Within the Forest, all lands would be available for leasing *except* existing and Forest Plan recommended wilderness (Management Areas P and Q in the Forest Plan), Wilderness Study areas (Big Snowy and Middle Fork Judith), **permitted ski areas**, and stream segments eligible for wild status under the Wild and Scenic Rivers Act.

The proposed action serves as a starting point for the analysis. It is not necessarily the action that is preferred for implementation. Through this analysis, another alternative (Alternative 7) has been identified as the Preferred Alternative.

PURPOSE AND NEED

The purpose and need for the proposed action are:

- To ensure that oil and gas leasing analysis and decisionmaking are conducted according to regulations for the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (36 CFR 228E).

- To implement Congressional direction for oil and gas leasing (Mineral Leasing Act of 1920, Mineral Leasing Act for Acquired Lands of 1947, Mining and Minerals Policy Act of 1970, National Materials and Minerals Policy, Research and Development Act of 1980, and the Federal Onshore Oil and Gas Leasing Reform Act of 1987).

- To ensure orderly development and conservation of the oil and gas resource (Forest Service Policy at FSM 2800 and 1990 RPA Program).

- To respond to interest and activity by the energy industry in oil and gas exploration and development in and adjacent to the Lewis and Clark National Forest.

- To implement Forest Plan goals, objectives, standards, and management direction for oil and gas leasing.

DECISIONS TO BE MADE

The Forest Service and the BLM, Federal agencies with separate responsibilities for lands within the project area, will make the following decisions based on the EIS:

- The Forest Supervisor will decide, within the Lewis and Clark National Forest EIS project area, if the availability decision made in the 1986 Forest Plan is appropriate. A new decision may be made as to which (if any) National Forest System lands are administratively available for oil and gas leasing, and under what conditions (lease stipulations). The availability decision is *not* a commitment to lease any lands. It simply sets the conditions under which lands could be leased while meeting Forest Plan standards and surface resource protection needs.

- The Forest Supervisor will decide what specific National Forest System lands, if any, the BLM will be authorized to offer for lease, subject to the Forest Service ensuring correct stipulations will be attached to leases issued by the BLM.

- The Forest Service will decide whether amendments to the 1986 Lewis and Clark National Forest Plan are necessary if an alternative other than the Proposed Action is selected.

- The BLM will decide whether or not to offer for lease the specific lands authorized by the Forest Service, and whether or not to lease non-Federal lands with Federal mineral ownership (split-estate lands) within the boundary of the Lewis and Clark National Forest.

* * *

[4] Alternative 7 – Preferred ~~(Replacement Maps 15 and 16)~~

This alternative responds to public concern regarding oil and gas development on the Rocky Mountain Division (a large number of public comments opposed oil and gas leasing and development in that portion of the Forest) while providing limited opportunities to explore for oil and gas. Oil and gas leasing and possible development would be allowed (with stipulations) within a one-mile corridor along either side of existing roads in the Blackleaf, Elk Creek, and Cuniff Basin areas only, on the Rocky Mountain Division. **Areas adjacent to these roaded corridors and in the Falls Creek area are stipulated by No Surface Occupancy to protect grizzly bear habitat while allowing for removal of oil and gas resources adjacent to areas in which occupancy is allowed.** Leasing with No Surface Occupancy would be allowed **in some areas** on a 1-mile strip along the eastern perimeter of National Forest lands on the Rocky Mountain Division to provide opportunities to extract oil and gas resources beneath the National Forest from surface locations outside the forest

boundary, using directional drilling techniques. *All other areas on the Rocky Mountain Division would not be leased.*

Included in the areas that would not be offered for lease is the RM-1 Geographic Unit (Badger-Two Medicine area) on the Rocky Mountain Division. Although some of the area is not currently leased, most of the area is already under lease and existing leases are under suspension. When the suspension is lifted, those leases will have from 3 to 7 years remaining on their 10 year lease term. In addition, final determination of boundaries for an identified traditional cultural district are still pending.

Similar to Alternative 6, this alternative is also designed to provide consistent management direction for road construction to access surface and subsurface resources in Management Areas F and G (on the Jefferson Division). This alternative allows leasing within a one-mile corridor of existing roads in Management Area G and applies a NSO stipulation to the remainder of the Management Area. A NSO stipulation would apply to all of Management Area F. In addition, this alternative would apply a NSO stipulation to watersheds supporting either "managed as pure" or "indicator" populations of westslope cut-throat trout.

Because of limited occupancy opportunities and high recreation use, the access corridor to Crystal Lake in the Big Snowy Mountains would not be leased. This corridor is surrounded by Wilderness Study Area lands. **A small area outside, but mostly surrounded by, inventoried roadless lands on the south side of the Big Snowy Mountains is also included in the No Lease Lands.**

The Prefered Alternative 7 was modified slightly from the Draft EIS to address concerns of the many people who took the time to respond to the Draft EIS. For example, changes to the preferred alternative presented in the Draft EIS were made to address concerns for leasing with NSO along a one-mile strip on the east edge of the Rocky Mountain Division. Where surface occupancy on lands adjacent to the Forest was not feasible, due to land management constraints, lands within the Forest were changed to No Lease. It was felt that no opportunities existed for directionally drilling to subsurface resources beneath the Forest in these areas. Complications regarding Federal drainage demands issues were also considered.

Consideration of critical grizzly bear habitat in the Cow Creek area on the Rocky Mountain Division resulted in applying a No Surface Occupancy stipulation to that area.

[5] It also incorporates new information received following release of the Draft EIS, including new information regarding additional watersheds supporting pure strain and introgressed populations of westslope cutthroat trout. In addition, permitted ski areas have now, by law, been withdrawn from mineral leasing. The Showdown and Teton Pass ski areas are now legally unavailable.

* * *

[7] D. PURPOSE AND NEED

The purpose and need for the proposed action includes:

■ *To ensure that oil and gas leasing analysis and decision-making are conducted according to regulations for the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (36 CFR 228E).*

Section 228.102(b) of the Code of Federal Regulations (CFR), Title 36, requires Forest Supervisors to develop a schedule for conducting leasing analyses. The Lewis and Clark National Forest was given high priority for completion of a Forest-wide leasing analysis.

Section 228.102(c) gives requirements for leasing analysis procedures and documentation. Sections 228.102(d) and 228.102(e) specify two leasing decisions, (1) "availability" and (2) "authorization to lease specific lands." The availability decision does not commit any lands to leasing, it just sets out terms under which leasing might be allowed in balance with forest plan direction. Although the availability decision was made in the 1986 Lewis and Clark Forest Plan, that plan was completed before the Leasing Reform Act regulations took effect. Therefore, we need to audit the availability decision to ensure it is supported by analysis and documentation conforming to the current regulations. We then need to complete the scheduled analysis to conclude with a lease authorization decision for lands within the Lewis and Clark National Forest.

The 228 regulatory schedule and leasing analysis is prospective in that the purpose of the analysis is to determine which lands will be made available and offered for lease for a time period of the next 15 years.

Decisions made through this analysis will be applied to leasing actions made during that time-frame. As such, it is not the purpose of this action nor was it intended to consider terminating existing lease rights or that determinations made as a result of this analysis be retroactively applied to existing leases.

■ *To implement Congressional direction for oil and gas leasing (Mineral Leasing Act of 1920, Mineral Leasing Act for Acquired Lands of 1947, Mining and Minerals Policy Act of 1970.*

Under those laws, the mission of the Forest Service in relation to minerals management is to support, facilitate, and administer the orderly exploration, development, and production of mineral and energy resources on National Forest System lands to help meet the present and future needs of the Nation.

The purpose of the proposed action is to contribute to the economic well-being of local communities and to the strategic interests of the nation while protecting other resource values.

■ *To ensure orderly development and conservation of the oil and gas resource (Forest Service Policy at FSM 2800 and 1990 RPA Program).*

The 1990 Resource Planning Act (RPA) Program provides general policy guidance at the National level based on a five-decade projection into the future. The Forest Service has defined nine roles in its basic National strategic plan.

Multiple-use management, contributions to rural development, and management in situations of mixed ownership are three of those roles. The issue of minerals development is described in the 1990 RPA Program as:

> "The mineral resources within the National Forest System significantly affect the economic well-being of local communities and the strategic defense of the Nation. The public is concerned about the effects of minerals development on other resource values and on the environment."

In the 1990 RPA Program, the long-term strategy for minerals is to meet most demands for access to explore and develop mineral resources, except when doing so would pose unacceptably high risks to other resources.

■ [8] *To respond to interest and activity by the energy industry in oil and gas exploration and development in and adjacent to the Lewis and Clark National Forest.*

As previously mentioned, over 26,000 acres on the Forest have lease applications pending. No decision will be made on those leases, or any other leases on the Forest, until completion of this analysis. Several areas on the Forest have had high levels of oil and gas industry interest, and four drilling proposals have been received. Drilling proposals have also been submitted for locations adjacent to the Forest along the Rocky Mountain Front. The results of those efforts could spur increased interest in oil and gas activity, including leasing, on the Forest.

■ *To implement forest plan goals, objectives, standards, and management direction for oil and gas leasing.*

The Forest Plan balances multiple uses and long-term net public benefits, aiming to protect natural resources while providing for a sustained yield of goods and services. The Forest Plan guides all natural resource management activities including oil and gas leasing, and establishes resource management standards. Through the analysis of this proposed action and alternatives presented in this EIS, we need to validate the availability and stipulation decisions made in the Forest Plan, ensure proper mapping and justification for stipulations, and, if necessary, identify corrections or amendments to the Forest Plan.

E. FOREST PLAN MANAGEMENT DIRECTION

The general management direction for the Lewis and Clark National Forest is found in the Forest Land and Resource Management Plan, referred to as the Forest Plan. The Forest Plan provides two levels of direction: Forest-wide standards and specific direction for sub-units within the Forest called management areas. The long range goals for the Lewis and Clark Forest include:

Goal No. 6 – Facilitate exploration and development of the mineral resources while protecting other resources through mitigating stipulations (Forest Plan, page 2-2).

Forest-wide objectives state: (Forest Plan, page 2-7) "Approximately 1.4 million acres of National Forest land on the Lewis and Clark National Forest, including potentially oil and gas-rich lands in the Rocky Mountain Division, are available for mineral entry and leasing under the Forest Plan. Mineral access, exploration, and development activities will be accomplished in a manner consistent with plan requirements for management of other

resources and uses. Within this frame-work, the plan provides for resource coordination and identifies stipulations and restrictions to ensure that oil and gas activities comply with plan requirements. The standards provided in the "Environmental Assessment on Oil and Gas Leasing on Non-Wilderness Lands" (February 1981) and "Environmental Assessment of Geophysical Exploration on Non-Wilderness Lands (July 1982) were analyzed in the planning process and brought forward into the Forest Plan to ensure consistency in management of oil and gas activities. Activities authorized under the mining laws will be administered under the appropriate regulations and according to the Forest Plan. All mineral activities that result in soil disturbance have required reclamation to prevent erosion and increased stream sediment."

* * *

[16] **ALTERNATIVE 7 (Preferred Alternative)** – This alternative responds to public concern regarding oil and gas development on the Rocky Mountain Division, it allows for limited occupancy opportunities while **addressing social values placed on the Rocky Mountain Division and** protecting grizzly bear management situation one habitat. Oil and gas leasing and possible development would be allowed (with stipulations) within a one-mile corridor along either side of existing roads in the Blackleaf, Elk Creek, and Cuniff Basin areas only on the Rocky Mountain Division. **Areas adjacent to these roaded corridors and in the Falls Creek area are stipulated by No Surface Occupancy to protect grizzly bear habitat while allowing for removal of oil and gas resources adjacent to areas in which occupancy is allowed. Based on public comment to the DEIS, a road corridor in the Cow Creek**

drainage (within the Blackleaf area) was removed from occupancy due to its importance as grizzly bear habitat. This area is now stipulated by NSO.

Leasing with No Surface Occupancy would be allowed **in some areas** along a 1-mile strip along the eastern perimeter of National Forest lands on the Rocky Mountain Division **where opportunities existed** to extract oil and gas resources beneath the National Forest from surface locations outside the Forest boundary, using directional drilling techniques. This would also prevent illegal drainage of Federal mineral resources. *All other areas on the Rocky Mountain Division would not be leased.*

Included in the areas that would not be offered for lease is the RM-1 Geographic Unit (Badger-Two Medicine area) on the Rocky Mountain Division. Although some of the area is not currently leased, most of the area is already under lease and existing leases are under suspension. When the suspension is lifted, those leases will have from 3 to 7 years remaining on their 10-year lease term. In addition, final determination of boundaries for an identified traditional cultural district are still pending.

Similar to Alternative 6, this alternative is also designed to provide consistent management direction for road construction to access surface and subsurface resources in Management Areas F and G (on the Jefferson Division). This alternative allows leasing within a one-mile corridor of existing road in Management Area G and applies a NSO stipulation to the remainder of the Management Area. A NSO stipulation would apply to all of Management Area F. A Forest Plan amendment would be required for this alternative.

[17] Because of limited occupancy opportunities and high recreation use, the access corridor to Crystal Lake in the Big Snowy Mountains would not be leased. This corridor is surrounded by Wilderness Study Area lands. **In addition, inventoried lands adjacent t[illegible]ilderness Study Act areas would not be offered for lease under the preferred alternative. A small area outside, but mostly surrounded by inventoried roadless lands on the south side of the Big Snowy Mountains is also included with the No Lease lands.** This alternative applies a NSO stipulation to watersheds supporting either "managed as pure" or "indicator" populations of westslope cutthroat trout.

* * *

[11] *D. FOREST PLAN AMENDMENTS*

The Forest Plan and its supporting EIS, including the Forest Plan ROD, and this Final EIS and ROD are not in agreement at this time. An amendment is needed to bring the Forest Plan into agreement with the site-specific analysis and findings of the Final EIS. Changes needed are incorporated in Amendment No. 21 to the Forest Plan, included with this ROD under separate cover.

THE FOREST PLAN addressed the availability of lands for leasing but did not specify lands to be offered for oil and gas leasing. THE FINAL OIL and GAS LEASING EIS not only reconsidered the previous availability determination of the Forest Plan, but also provides the site-specific analysis needed to authorize specific lands for leasing in accordance with 36 CFR 228.102(e). Supplemental lease stipulations identified in the Final EIS for

resource protection are included in Forest Plan Amendment No. 21. The Selected Alternative in this ROD has identified those acres that are available for oil and gas leasing, as well as those areas that I am authorizing the BLM to offer for lease. Twenty eight percent (28%) of *legally available* lands are *not* offered for oil and gas leasing activity under the Selected Alternative.

Amendment No. 21 to the Lewis and Clark National Forest Land and Resource Management Plan will make minor changes in management standards and guidelines, and prescriptions.

Significance Determination of Forest Plan Amendments

The changes resulting from Amendment No. 21 do not alter the long-term relationship between levels of multiple-use goods and services as projected by the Forest Plan. The amendment is not significant for the purposes of the planning process based on the following factors identified in FSH 1909.12, section 5.32 and the direction found in 36 CFR 219.10(f):

> [12] *Timing* – This change will take place during the planning period. The change is based on the Federal Onshore Oil and Gas Leasing Reform Act enacted by Congress in 1987. This change is not significant because the 1986 Forest Plan contains overall direction and stipulations for leasing (Forest Plan ROD, page 9 and Forest Plan pages 2-56 through 2-58).
>
> *Location and Size* – The area analyzed for these decisions is the same as the area analyzed for the 1986 Forest Plan. While decisions affecting portions of the planning area (specifically, the Rocky Mountain Division) might be generalized

to be significant amendments, in this case, the amendment is not significant because it is consistent with overall direction contained in the 1986 Forest Plan and ROD which notes that any new leases or reissuance of leases will undergo additional NEPA, including an analysis of new information, and will meet the overall direction and stipulations outlined in the Forest Plan (Forest Plan ROD, page 9, and Forest Plan, page 2-56). As a measure of the level of change resulting from these amendments, I compared the amount of acreage that would either not be leased or leased with No Surface Occupancy between the Forest Plan alternative (Alternative 2) and my decision. I find that there is about 8% more land within the total Forest area under my Selected Alternative that would either not be leased or leased with No Surface Occupancy as compared to the Forest Plan alternative.

Goals, Objectives, and Outputs – These decisions do not alter the long-term relationships between the levels of goods and services projected by the Forest Plan, therefore, the amendment is not significant. The results of a comprehensive analysis that considered the cumulative effects of activities on the resources, economics, and social patterns of the planning area guided these decisions.

Management Prescription – This change only affects oil and gas leasing and development opportunities. It does not alter the desired future condition of the land and resources or the anticipated goods and services to be produced.

* * *

[15] Alternative 7 (Final EIS Preferred Alternative)

This alternative responds to public concern regarding oil and gas development on the Rocky Mountain Division (a large number of public comments opposed oil and gas leasing and development in that portion of the Forest) while providing limited opportunities to explore for oil and gas. Oil and gas leasing and possible development would be allowed (with stipulations) within a one-mile corridor along either side of existing roads in the Blackleaf, Elk Creek, and Cuniff Basin areas only, on the Rocky Mountain Division. Areas adjacent to these roaded corridors and in the Falls Creek area are stipulated by No Surface Occupancy to protect grizzly bear habitat while allowing for removal of oil and gas resources adjacent to areas in which occupancy is allowed. Based on public comment to the Draft EIS, a road corridor in the Cow Creek drainage (within the Blackleaf area) was removed from occupancy due to its importance as grizzly bear habitat. This area is now stipulated by NSO.

Leasing under a No Surface Occupancy stipulation would be allowed *in some areas* along a 1-mile strip along the eastern perimeter of National Forest lands on the rocky Mountain Division where opportunities existed to extract oil and gas resources beneath the National Forest from surface locations outside the forest boundary, using directional drilling techniques. *All other areas on the Rock Mountain Division would not be leased.*

Included in the areas that would not be offered for lease is the RM-1 Geographic Unit (Badger-Two Medicine area) on the Rocky Mountain Division. Although some of the area is not currently leased, most of the area is already

under lease and existing leases are under suspension. When the suspension is lifted, those leases will have from 3 to 7 years remaining on their 10-year lease term. In addition, the final determination of eligibility to the National Register of Historic Places for an identified traditional cultural district in this area is still pending.

[16] Similar to Alternative 6, this alternative is also designed to provide consistent management direction for road construction to access surface and subsurface resources in Management Areas F and G (on the Jefferson Division). This alternative allows leasing within a one-mile corridor of existing roads in Management Area G and applies a NSO stipulation to the remainder of the Management Area. A NSO stipulation would apply to all of Management Area F. In addition, this alternative would apply a NSO stipulation to watersheds supporting either "managed as pure" or "indicator" populations of westslope cutthroat trout.

Because of limited occupancy opportunities and high recreation use, the access corridor to Crystal Lake in the Big Snowy Mountains would not be leased. This corridor is surrounded by Wilderness Study Area lands. In addition, inventoried lands adjacent to Wilderness Study Act areas would not be offered for lease. A small area outside, but mostly surrounded by, inventoried roadless lands on the south side of the Big Snowy Mountains is also included with the No Lease lands.

* * *

No. 01-213

Supreme Court, U.S.
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In The
Supreme Court of the United States

INDEPENDENT PETROLEUM
ASSOCIATION OF AMERICA,
Petitioner,

v.

UNITED STATES FOREST SERVICE,
and

MONTANA WILDERNESS ASSOCIATION, *et al.*,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an oil and gas association suffers an "injury in fact" for Article III standing purposes when the United States Forest Service exercises its discretionary authority to refrain for the time being from offering new oil and gas leases on particular national forest lands.

2. Whether an oil and gas association has prudential standing to pursue its purely economic interests in claims brought under two National Environmental Policy Act (NEPA) regulations, 40 C.F.R. § 1502.14 and 40 C.F.R. § 1503.1.

3. Whether the United States Forest Service is prohibited from considering the aesthetic impacts of oil and natural gas development when deciding whether to offer new oil and natural gas leases on national forest land.

LIST OF PARTIES

The following are parties to proceeding:

1. Petitioner:

Independent Petroleum Association of America

2. Respondents:

United States Forest Service
Montana Wilderness Association
Professional Wilderness Outfitters
Back Country Horsemen of Montana
The Wilderness Society, Inc.
Sierra Club
Montana Audubon
National Wildlife Federation
KAA Mo Taan
George Engler

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Montana Wilderness Association, Professional Wilderness Outfitters, Back Country Horsemen of Montana, The Wilderness Society, Sierra Club, Montana Audubon, and National Wildlife Federation have no parent companies and issue no corporate stock.

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INTRODUCTION

This case concerns a 1997 oil and gas leasing decision by the United States Forest Service for lands in the Rocky Mountain Division of the Lewis and Clark National Forest in Montana. For a variety of reasons, including overwhelming public opposition to industrial development in the area and the presence of numerous Native American cultural and religious sites, the Forest Service decided not to offer new oil and gas leases on the Rocky Mountain Division at this time. The Independent Petroleum Association of America (IPAA), an oil and gas trade association, challenged the Forest Service's decision on a variety of grounds. In a pair of unpublished decisions, the District of Montana and the Ninth Circuit rejected the association's challenges on substantive and jurisdictional grounds. This petition followed.

IPAA's petition should be denied. Because the Ninth Circuit's decision was unpublished, the ruling below does not set any precedent whatsoever. Nor can it possibly produce a split in authority worthy of Supreme Court review. Moreover, review would be unwarranted even if the opinion below had been published. The Forest Service made a balanced leasing decision that was fully supported by the evidentiary record. The Ninth Circuit's decision upholding that decision was correct as a matter of law and in perfect keeping with the case law in this Court and in every court of appeals. This unexceptional and unpublished opinion does not warrant Supreme Court review.

STATEMENT OF THE CASE

A. Background Of Oil And Gas Leasing On The Lewis And Clark National Forest

The Forest Service is responsible for managing the 191 million acres of land in the 155 units of the National Forest System. *See* 58 Fed. Reg. 19,369 (April 14, 1993). One of

the most spectacular of these units is the Lewis and Clark National Forest in Montana. This 1.8-million acre national forest is composed of two very different and geographically distinct divisions. The Jefferson Division has been heavily impacted by logging, grazing, mining, and road construction. By contrast, the relatively undeveloped Rocky Mountain Division encompasses much of Montana's spectacular Rocky Mountain Front just south of Glacier National Park.

The Rocky Mountain Front is home to some of the nation's most rare and imperiled wildlife, including the gray wolf and grizzly bear. In addition to hosting one of the most abundant and varied arrays of wildlife in the lower-48 states, the Front is a place of awe-inspiring physical beauty. Sculpted by alpine glaciers, the Front's mountains boast spectacular peaks, steep ridges, and narrow valleys. The Rocky Mountain Front is also endowed with Native American cultural and archaeological resources of immense significance. Pictographs, tipi rings, monumental rock features, cairns, vision quest locations, eagle catching pits, sweat lodges, conical timbered lodges, communal kill sites, and quarries have all been found on the Front. To this day, Blackfeet Nation tribal members use areas on the Front for cultural, religious, and subsistence purposes. This case has arisen because, in addition to the Front's remarkable environmental and Native American cultural attributes, some in the oil and gas industry believe that the area is endowed with significant natural gas reserves.

Forest Service oil and gas leasing decisions, including the one challenged in this case, are governed by the Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et seq.*, as amended by the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA), 30 U.S.C. § 226(g)-(h). Regulations adopted pursuant to FOOGLRA create a staged decision-making process for oil and gas leasing. In the first stage, the Forest Service analyzes which lands should be "available" for possible leasing. 36 C.F.R. § 228.102(b)-(d). In the

second stage, the Forest Service considers which "available" lands to actually offer for leasing. 36 C.F.R. § 228.102(e). Finally, if the additional conditions set out in 36 C.F.R. § 228.102(e)(1)-(3) are satisfied, the Forest Service authorizes the Bureau of Land Management to offer the specified lands for lease. *Id.*; *Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 45 (D.C. Cir. 1999) (describing leasing process). Thus, before a National Forest area can be leased to an oil and gas company, the land must pass both the "availability" stage of 36 C.F.R. § 228.102(d) and the "leasing" stage of 36 C.F.R. § 228.102(e).

Before it made its availability and leasing decisions for the Lewis and Clark National Forest, the Forest Service, as required by NEPA, prepared an environmental impact statement (EIS) that analyzed the impacts of a range of alternative development scenarios. *See* 42 U.S.C. § 4332(C). In so doing, the Service complied with NEPA's public participation provisions by circulating a draft version of the EIS for public review and comment. *See* 40 C.F.R §§ 1502.19, 1503.4, 1506.6 (public involvement regulations). In addition, the agency held informal briefing sessions with federal, state, county, local and tribal agencies and governments, and held a series of informational open houses throughout Montana.

The response was a resounding call for the Front to be put off limits to new development. As the Forest Service pointed out in its leasing decision, "[t]he vast majority of those responding to the Draft EIS were strongly against any development for the purposes of oil and gas exploration in the Lewis and Clark National Forest, particularly on the Rocky Mountain Front." App. 11.[1] Far from the being

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[1] The abbreviation "Pet. App." is used throughout to refer to the appendix to the petition for writ of certiorari. "App." refers to the appendix to this brief in opposition.

limited to the "emotional concerns of those far distant from Montana," as IPAA asserts, Pet. 2, opposition to oil and gas development on the Front came from a broad range of informed participants in the planning process, including elected officials, conservationists, editorial boards, recreationists, hunters, wilderness outfitters, small businesses, and tribal members. Newspapers ranging from the New York Times to the Great Falls Tribune in Montana editorialized against the exploitation of the Front's potential oil and gas reserves. Furthermore, a poll conducted by the Great Falls Tribune revealed that opposition to the development of the Front crossed Montana's regional, age, and gender lines.

The public's opposition to the development of the Front was based on many things. As Forest Supervisor Flora pointed out when she made the leasing decision, many opposed oil leasing on the Front for deep-seated aesthetic and emotional reasons. App. 11.[2] The ability to experience a truly wild landscape has become increasingly rare as America's few remaining wildlands have become settled, developed, and domesticated. This rare opportunity should not be sacrificed, many commentators remarked, for the sake of oil and gas development. *Id.* Other commentators opposed new oil and gas development because of the potential loss of recreational and hunting opportunities. This fear motivated many outfitters and related small businesses to oppose new leasing on the Front. In sum, the public's opposition to oil and gas development on the Front was broad, deep,

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[2] It is difficult to put a label on the social and personal concerns expressed by so many during the public comment period. In its leasing decision, the Forest Service refers to them collectively as "value of place" concerns. *See* App. 11. Because the experiential appreciation of an undeveloped landscape underlies so many of these comments, this brief refers to these as "aesthetic" concerns.

consistent, and overwhelming. While their reasons for opposing development varied, tribal members, conservationists, county commissioners, outfitters, dude ranchers, and many other citizens throughout Montana and the nation joined together in a chorus of opposition to the development of the Front's unique wildlands.

B. The Forest Service Leasing Decision At Issue In This Case

The Forest Service heeded the public's call when it made its oil and gas leasing decision in 1997. Rather than adopting a blanket, one-size-fits-all strategy for the 1,862,453 acres of land that make up the Lewis and Clark National Forest, the Forest Service chose a more tailored plan that differentiates between the Forest's two very different divisions. The Forest Service adopted a very aggressive approach to oil and gas development on the already-developed Jefferson Division pursuant to which: (1) all lands that are legally available for leasing would remain administratively available[3]; and (2) all administratively available lands would be offered for lease subject to appropriate stipulations and management directives. App. 6-8, 15; *supra* at 2-3 (explaining two-step leasing decision process).

As befits the area's very different character, the Forest Service adopted a different approach for the Rocky Mountain Division. As it did on the Jefferson Division, the Forest Service decided to continue to make all legally available lands administratively available for leasing. App. 6-8. However, the Forest Service decided not to offer new oil and gas leases in the Rocky Mountain Division at this time. App. 10-14. Because the Forest Service decided that the

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[3] The areas of national forests that are not legally available for oil and gas leasing are designated wilderness areas, wilderness study areas, areas that the Forest Service has recommended be designated as wilderness, and permitted ski areas.

legally available lands in the Rocky Mountain Division would remain administratively available, the Forest Service retained its ability to offer new leases in the area in approximately 15 years when the agency must revisit its development plans for the Lewis and Clark National Forest. App. 14. Thus, as the agency noted at the time, the Forest Service's decision "provides for flexibility in future leasing decisions" for the Rocky Mountain Division. App. 8.

In its Questions Presented and its Statement of the Case, IPAA suggests that the Forest Service's decision not to offer new leases at this time was based entirely on the "psychological" and "non-specific, emotional concerns" expressed by the public during the public comment period. *See* Questions Presented, Pet. 2. As the district court noted, this is "simply false." Pet. App. 12-13 n.3. The Forest Service based its decision on several factors, including religious and economic considerations.[4] Supervisor Flora states quite clearly that her decision was based both on "public comment and the information disclosed in the Final EIS." App. 10 (emphasis added). That information supported the economic and cultural, as well as the aesthetic, grounds upon which Supervisor Flora made her leasing decision.

That the Forest Service's decision was based, in part, on cultural considerations is apparent from the opening sentence of the agency's explanation for its decision. Supervisor Flora states in the Record of Decision that the potential impacts from oil and gas development to the cultural district

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[4] IPAA's suggestion that the Forest Service's leasing decision was based entirely on the public's aesthetic concerns is particularly surprising because IPAA argued in the courts below that the Forest Service decision violated the Constitution's Establishment Clause because the decision was founded in part on another concern, the desire to accommodate Native American religious concerns. *See* Pet. App. 3-4 (Ninth Circuit decision rejecting Establishment Clause claim).

in the Badger-Two Medicine portion of the Rocky Mountain Division provide "compelling reasons" not to offer new leases in that area. *Id.*

The Record of Decision also states that economic factors played a role in the agency's decision. App. 13. While Supervisor Flora recognized that development might provide revenue to local and state government, she noted quite rightly that maintaining the Front in a relatively undeveloped state could generate even more revenue over the long-term through tourism and recreational uses. App. 13. The Forest Service also found that there was no pressing need to exploit the potential natural gas reserves under the Rocky Mountain Front because of projections showing that adequate supplies would be available from other sources for at least fifteen to twenty years. App. 11.

C. The Proceedings Below

The Rocky Mountain Oil and Gas Association (RMOGA) sued the Forest Service in the District of Montana on May 21, 1998. IPAA was allowed to intervene as a plaintiff on December 30, 1998. In its motion for summary judgment, IPAA argued that the Forest Service's leasing decision violated NEPA, the Administrative Procedures Act, the Multiple-Use Sustained-Yield Act, the National Forest Management Act, and the Establishment Clause.

On March 7, 2000, in an unpublished opinion, the district court rejected every one of RMOGA's and IPAA's arguments on both substantive and jurisdictional grounds. Pet. App. 8-14. The court of appeals affirmed unanimously on May 3, 2001. Pet. App. 1-5.[5] The Ninth Circuit held that: (1) IPAA lacked Article III standing to pursue its statutory claims; (2) IPAA lacked prudential standing to

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[5] RMOGA did not appeal its loss in the District of Montana. The Ninth Circuit appeal, like this petition for a writ of certiorari, was pursued solely by IPAA.

pursue its purely economic interests through a NEPA claim; (3) the Forest Service's decision was not ultra vires because NEPA does not prohibit a federal agency from considering the psychological impacts of its actions and because the agency's consideration of those impacts in this case was not arbitrary; and (4) the Forest Service's consideration of the impacts of oil and gas leasing on Native American religious and cultural sites did not violate the Establishment Clause. Pet. App. 2-4. Like the district court opinion, the Ninth Circuit's opinion was unpublished. Pet. App. 1.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S DECISION WAS UNPUBLISHED.

IPAA asserts that the Ninth Circuit's decision in this case "expands a growing and nationally significant split between the Circuit Courts," Pet. 19, and "is in direct and intolerable conflict" with decisions from other courts, *id.* at 25. This dramatic language ignores the fact that the Ninth Circuit's opinion, like the district court's opinion before it, was unpublished. *See* Pet. App. 1. Under the Ninth Circuit's rules, therefore, the decision sets no precedent and may not even be cited to or by the courts of the Ninth Circuit. *See* App. 21 (Circuit Rule 36-3).[6] Thus, far from creating the harmful precedent and circuit splits imagined by IPAA, the Ninth Circuit's decision in this case sets no precedent

[6] There are several very narrow exceptions to this general rule, none of which are relevant to this appeal. For example, an unpublished opinion from the Ninth Circuit may be cited when relevant for the doctrine of law of the case, res judicata, or collateral estoppel. *See* App. 21 (Circuit Rule 36-3).

whatsoever.[7] As such, it is a remarkably poor candidate for Supreme Court review.

The Ninth Circuit's decision not to publish its decision no doubt explains the brevity with which it dispatched IPAA's claims. There is little incentive for a panel to set out its reasoning in great detail when the decision will not have any precedential force. Because the Ninth Circuit summarily rejected IPAA's claims rather than fully explicating the analyses underlying its decision, this Court would not have the benefit of a lower court's careful development of the issues involved. This fact, too, renders this case an extremely poor vehicle for Supreme Court review.

II. THERE IS NO CONFLICT REGARDING ARTICLE III STANDING.

Article III of the Constitution limits the jurisdiction of the federal judiciary to the resolution of "cases" or "controversies." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Id.* In order to satisfy this standing requirement, a plaintiff must demonstrate that: (1) he has been injured by the challenged action; (2) the injury was caused by the challenged action; and (3) it is likely that the injury will be redressed by a favorable court decision. *Id.* at 560-61.

IPAA argues that the Ninth Circuit's conclusion that IPAA has not suffered an injury sufficient to support its standing to pursue its statutory claims conflicts with *Arkla Exploration Co. v. Texas Oil and Gas Corp.*, 734 F.2d 347

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[7] The Ninth Circuit's decision to issue an unpublished memorandum rather than a published opinion is indicative of the court's view that IPAA's case was neither strong nor analytically complex. *See* App. 20 (Circuit Rule 36-2 describing circumstances under which a court will order the publication of its opinion).

(8th Cir. 1984), and with several recent decisions by this Court concerning government contracting rules. No such conflict exists.

IPAA asserts that the Forest Service's decision not to offer new leases on the Rocky Mountain Division at this time injures the association because its members were denied "the opportunity to bid for valuable rights." Pet 14. *See also* Pet. 20 (asserting that it has suffered the requisite injury because its members were "barred from bidding on oil and gas leases" in the area). In making this argument, IPAA loses sight of the fact that, for Article III purposes, it is not enough that the Forest Service's decision is less economically advantageous to IPAA than the aggressive development option that IPAA favors. Rather, the challenged action must mark an "invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. Thus, in order for the Forest Service's no-leasing decision to injure IPAA within the meaning of Article III, IPAA must have a legally protected right to bid for new oil and gas leases in the Rocky Mountain Division.

The principle that a plaintiff's injury must be based on a legally protected interest in order to satisfy Article III is exemplified in *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800 (11th Cir. 1993), in which the Eleventh Circuit held that timber companies did not have standing to challenge a Forest Service program to protect an imperiled woodpecker species. The court reached this result even though the program reduced the amount of timber that would be available for purchase in the future. Because the court determined that "the Timber Companies have no right to compel the Forest Service to sell any future timber to them," the court held that a program that reduced the amount of available timber did not affect any legally protected interest and so did not injure the timber companies for standing purposes.

Similarly, in *State of Utah v. Babbitt*, 137 F.3d 1193, 1207 (10th Cir. 1998), the Tenth Circuit held that the State of Utah did not have standing to challenge the federal government's refusal to allow the State to participate in a federal land wilderness inventory. The court explained that "[w]e look first to . . . determine whether Plaintiffs have a right to participate in the inventory process. If we conclude that Plaintiffs do not have such a right, then Plaintiffs' claimed injury based on the denial of this right is without merit and they consequently lack standing to challenge the 1996 inventory on these grounds." *See also Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997) ("if the plaintiff's claim has no foundation in law, he has no legally protected interest and thus no standing to sue."); *Arjay Assoc. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989) ("We hold that appellants lack standing because the injury they assert is to a nonexistent right . . . .").

Just as the State of Utah had no legally protected right to participate in the wilderness inventory process and the timber companies had no right to compel the Forest Service to offer them timber, so IPAA has no right under any statute to bid on new natural gas leases in the Rocky Mountain Division. The Mineral Leasing Act of 1920, which governs oil and gas leasing on the national forests, leaves the Forest Service with broad discretion concerning where, if anywhere, to offer new leases. The Act states generally that "[a]ll lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary." 30 U.S.C. § 226(a) (emphasis added). The "permissive word 'may' in § 226(a) allows the Secretary to lease such lands, but does not require him to do so . . . . [T]he Secretary has discretion to refuse to issue any lease at all on a given tract." *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975). This Court reached the same conclusion in *Udall v. Tallman*, 380 U.S. 1, 4 (1965), in which it declared that the Mineral Leasing Act "left the

Secretary discretion to refuse to issue any lease at all on a given tract." *See also Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988) (refusal to issue leases constitutes "legitimate exercise of the discretion granted to the Interior Secretary"); *McDonald v. Clark*, 771 F.2d 460, 463 (10th Cir. 1985) ("While the statute gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory."); *McTiernan v. Franklin*, 508 F.2d 885, 887 (10th Cir. 1975) (under § 226(a), the government "may refuse to issue any lease at all on a given tract"); *Pease v. Udall*, 332 F.2d 62, 63 (9th Cir. 1964) (Mineral Leasing Act "has consistently been construed as leaving to the Secretary, within his discretion, a determination as to what lands are to be leased thereunder"); *Pacific Legal Found. v. Watt*, 529 F. Supp. 982, 991 n.14 (D. Mont. 1982) (under § 226(a), "the Secretary has discretion either to issue or refuse to issue oil and gas leases").[8] As this extensive and unanimous case law demonstrates, IPAA has no legally protected interest in being

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[8] These cases undermine IPAA's claim that the Secretary's no-lease decision must be subject to judicial review under the Administrative Procedure Act (APA). Pet. 12-13. Because, as the case law makes clear, the Mineral Leasing Act does not place any legal restrictions whatsoever on the Secretary's ability to refrain from offering new leases, any such decision is necessarily exempt from judicial review under the APA. *See* 5 U.S.C. § 701(a)(2) (APA's judicial review provisions do not apply to actions "committed to agency discretion by law"); *see also Webster v. Doe*, 486 U.S. 592, 599-600 (1988) (statute giving Director of CIA power to terminate agency employees whenever the Director "shall deem such termination necessary or advisable in the interests of the United States" strongly suggests that termination decisions are "committed to agency discretion by law" and so not subject to judicial review) (quoting 50 U.S.C. § 403(c) (National Security Act of 1947) and 5 U.S.C. § 701(a)(2)).

offered leases on the Rocky Mountain Division.[9] Lacking any such interest, IPAA necessarily fails the injury prong of the Article III standing test.[10]

IPAA does not address any of the above case law in its petition. Instead, it relies on *Arkla Exploration Co. v. Texas Oil and Gas Corp.*, 734 F.2d 347 (8th Cir. 1984), and on a series of decisions from this Court concerning government contracting. *See* Pet. 14-20. These cases, however, are

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[9] IPAA attempts to manufacture a right to bid on leases in the Rocky Mountain Division by misquoting 30 U.S.C. § 226(b)(1)(A). *See* Pet. 14 n.4. Far from creating a right to be offered a lease on any land within a producing oil and gas field, as IPAA's misquotation implies, § 226(b)(1)(A) simply provides that competitive bidding will take place in most instances for the lands that the Secretary has, in his discretion, previously decided should be leased. *Duesing v. Udall*, 350 F.2d 748, 750 (D.C. Cir. 1965) (under the Mineral Leasing Act, "it is permissive or discretionary whether or not the Secretary will issue a lease on lands believed to contain oil or gas deposits. What is mandatory is who is to get the lease if it is decided that a lease will be issued – if there is a known geologic structure, the highest bidder; if not, the first applicant in line.").

[10] In addition, IPAA cannot satisfy the redressability requirement of Article III because no court may compel the Forest Service to offer new oil and gas leases in the Rocky Mountain Division. *See, e.g., Ash Creek Mining Co. v. Lujan*, 969 F.2d 868, 874 (10th Cir. 1992) (mining company failed to satisfy redressability requirement when it alleged that it would suffer economic injury from a land exchange that would prevent the company from competing for possible government coal leases on the exchanged land); *Marathon Oil Co. v. Babbitt*, 966 F. Supp. 1024, 1025-26 (D.Colo. 1997), *aff'd*, 166 F.3d 1221 (10th Cir. 1999) (unpublished), *cert. denied*, 528 U.S. 819 (1999) (because court may not order government to offer particular oil and gas leases, oil company could not satisfy redressability requirement in challenge to federal government's decision not to offer new oil and gas leases in area of Colorado).

entirely inapposite because they involve instances in which agencies had decided to offer contracts for bid and the plaintiffs challenged the legality or constitutionality of the bidding processes. *See Arkla*, 734 F.2d at 353-54 (challenge to granting of oil and gas leases that were awarded on a noncompetitive rather than competitive basis); *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 659 (1993) (equal protection challenge to city ordinance that gave preferential treatment to certain minority-owned businesses in the awarding of city contracts); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 204-10 (1995) (equal protection challenge to federal government's practice of giving general contractors on government projects a financial incentive to hire certain minority-owned subcontractors). None of these cases had anything whatsoever to do with whether the plaintiffs had standing to challenge an agency's discretionary decision not to offer a contract in the first place.[11]

There is no question that bidders have a cognizable legal interest in the legality and constitutionality of any bidding process in which they have a right to be involved. Therefore, there is little question but that IPAA would have standing to challenge the Forest Service if the agency had decided to

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[11] IPAA also cites to *Bryant v. Yellen*, 447 U.S. 352 (1980), to support its argument that it has suffered a cognizable injury even though it has no right to be offered any leases at all in the Rocky Mountain Division. *See* Pet. 14-15. In that case, however, the Court found that it was "likely" that lands would become available were the desired judicial relief granted. *Bryant*, 447 U.S. at 368. Though IPAA baldly asserts that oil and gas leases would likely be offered if it were to prevail in this case, Pet. 15, there is not the slightest shred of evidence to support this view. Furthermore, given the many reasons behind the Forest Service's no-leasing decision, *see* text *supra* at 6-7, there is every reason to believe that the agency will refrain from offering leases regardless of the final outcome of this litigation.

offer the Rocky Mountain Division for oil and gas leasing and then carried out the bidding process in an illegal or unconstitutional manner. However, as demonstrated by the discretionary language in the Mineral Leasing Act, and as recognized by this Court and others, the Forest Service has absolutely no duty under the Mineral Leasing Act to offer the Rocky Mountain Division for leasing at this or any other time. As a consequence, IPAA can have no legally protected right to bid for oil and gas leases in the area.

The distinction that IPAA fails to appreciate between an interest in being offered a new lease in an undeveloped area and an interest in the legality of the bidding process for any lease that the agency decides to offer has not been lost on other courts. In *Region 8*, the timber companies, like IPAA in this case, argued that they had standing to challenge the woodpecker preservation program because the companies were analogous to losing bidders for a government contract. *Region 8*, 993 F.2d at 808 n.12. The Eleventh Circuit rejected this argument, explaining that the timber companies "fail to appreciate that a losing bidder has a right that bid procedures be conducted in accordance with the applicable statutes and regulations, and that its bid not be arbitrarily rejected. . . . No such right is conferred upon the Timber Companies" to be offered any particular amount of timber. *Id.*

This Court, too, has appreciated that the Mineral Leasing Act may create a cognizable legal interest once a lease is offered without creating a legal interest in being offered the lease in the first place. As this Court explained in *Udall v. Tallman*, although the Mineral Leasing Act "directed that if a lease was issued on such a tract, it had to be issued to the first qualified applicant, it left the Secretary discretion to refuse to issue any lease at all on a given tract." *Udall v. Tallman*, 380 U.S. 1, 4 (1965); *see also Duesing*, 350 F.2d at 750-51 (under the Mineral Leasing Act, merely filing an application to lease an area "does not give any right to lease,

or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved").

As the preceding discussion demonstrates, courts have held unanimously that the Forest Service has broad discretion under the Mineral Leasing Act to refuse to offer any particular areas for new oil and gas leasing. Because of this discretion, neither IPAA nor any of its members have a legally cognizable interest in being offered new leases in the Rocky Mountain Division. Lacking such an interest, IPAA cannot satisfy the injury prong of the Article III standing test. There is no conflict among the circuits or with this Court on this point. IPAA's request for writ of certiorari on this issue should be denied.

III. THERE IS NO CONFLICT REGARDING PRUDENTIAL STANDING.

IPAA argues that the Ninth Circuit's conclusion that the association lacked prudential standing to pursue its NEPA claims conflicts with *Bennett v. Spear*, 520 U.S. 154 (1997), and with the Eighth Circuit's decision in *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999). Pet. 22-25. IPAA is mistaken.

In *Bennett v. Spear*, this Court held that plaintiffs' economic interests fell within the zone of interests of 16 U.S.C. § 1536(a)(2), an Endangered Species Act ("ESA") provision that requires an agency to "use the best scientific and commercial data available." *Bennett*, 520 U.S. at 176-77. Plaintiffs had prudential standing, this Court held, because one objective of this particular provision is to "avoid needless economic dislocation." *Id.* at 176. In reaching this conclusion, this Court emphasized that:

> Whether a plaintiff's interest is "arguably . . . protected . . . by the statute" within the meaning of the zone-of-interests tests is to be determined not by

> reference to the overall purpose of the Act in question . . . , but by reference to the particular provision of law upon which the plaintiff relies.

Id. at 175-76 (quoting *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970)). Thus, *Bennett* stands for the proposition that an economic interest may satisfy the prudential standing requirement in an environmental statute only if plaintiff's suit is based on a provision that has an economic purpose.

Courts before and after *Bennett* repeatedly have held that purely economic interests are not within NEPA's zone of interests. For example, in *ANR Pipeline Co. v. FERC*, 205 F.3d 403, 407-08 (D.C. Cir. 2000), Judge Silberman ruled that a pipeline company with purely economic interests lacked prudential standing to challenge the adequacy of the range of alternatives in a NEPA analysis. *See also Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1157-58 (9th Cir. 1998) (post-*Bennett* decision holding that "[p]urely economic interests do not fall within the zone of interests to be protected by NEPA"); *Western Radio Servs., Co. v. Espy*, 79 F.3d 896, 902-03 (9th Cir. 1996) ("NEPA's purpose is 'to protect the environment, not the economic interests of those adversely affected by agency decisions.'") (quoting *Nevada Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993)); *Hurd Urban Dev., L.C. v. Federal Highway Admin.*, 33 F. Supp. 2d 570, 573-74 (S.D.Tex. 1998) (listing cases and concluding that "all NEPA claims based on economic harm must be dismissed for lack of jurisdiction"); *cf. Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983) (NEPA's purpose is to "protect[] the physical environment").

The lone case in which a court has found that purely economic interests are within the zone of interests of any NEPA provision is *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999), the case upon

which IPAA relies. In that case, a coalition of outfitters and others with purely economic interests challenged the range of alternatives and the adequacy of the economic analysis in the EIS for a management plan for the Boundary Waters Canoe Area. *Id.* at 1125-27. Unlike every other court to consider the issue, the Eighth Circuit concluded that the outfitters had prudential standing because the court believed that the particular statutory provisions and regulations at issue in that case have an economic purpose. *Id.*

Even if *Friends of Boundary Waters* were the rule rather than the outlier case that it is, there would be no conflict between that case and the Ninth Circuit's decision here because IPAA's legal claims are not based on either of the NEPA provisions that IPAA believes have an economic component. The first provision upon which IPAA relies for its prudential standing is the extremely general policy statement in NEPA that:

> it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S.C. § 4331(a) (cited at Pet. 23). This policy statement – which likely could not give rise to any legal claim at all – was never cited in IPAA's administrative appeal or complaint. Nor was this section so much as mentioned in IPAA's district or appellate court briefing. The same is true for the second provision cited by IPAA, 40 C.F.R. § 1508.14, which requires NEPA analyses to consider the economic impacts of an action when those impacts are interrelated with the action's environmental impacts. *See* Pet. 23.

IPAA claims in this case that the Forest Service violated NEPA by adopting a leasing alternative that did not provide for any new oil and gas leasing in the Rocky Mountain Division and by making a leasing decision that combined two alternatives from the Final EIS. According to IPAA's complaint, these actions violated two NEPA regulations concerning public disclosure and comment, 40 C.F.R. § 1502.14 and 40 C.F.R. § 1503.1. Neither of these regulations have any economic component and neither is related in any way to 42 U.S.C. § 4331(a) or 40 C.F.R. § 1508.14, the two NEPA sections cited in the petition to support IPAA's prudential standing. Under *Bennett*'s provision-specific approach, therefore, 42 U.S.C. § 4331(a) and 40 C.F.R. § 1508.14 are entirely irrelevant to the prudential standing inquiry in this case. As the D.C. District Court explained just last year in a similar case:

> *Bennett* makes clear that in determining whether plaintiffs' interest is protected by the statute, the Court looks only at the statutory provision at issue . . . . Plaintiffs, however, rely on statements in the legislative history and in other provisions of the statute to make th[eir] argument. Under *Bennett*, this analysis is clearly inappropriate.

National Wildlife Fed'n v. Westphal, 116 F. Supp. 2d 49, 54 (D.D.C. 2000).

Because the regulations upon which IPAA's NEPA claims are founded do not have any economic component or purpose, IPAA lacks prudential standing to pursue its economic interests through NEPA. The Ninth Circuit's conclusion to this effect is in perfect keeping with the case law and so does not warrant review by this Court.

IV. THE FOREST SERVICE IS FREE TO CONSIDER AESTHETIC AND PSYCHOLOGICAL FACTORS WHEN MAKING OIL AND GAS LEASING DECISIONS.

IPAA asserts that *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), required the Forest Service to ignore the public's aesthetic and psychological concerns when the agency was deciding whether to allow new oil and gas development on the Rocky Mountain Front. *See* Pet. 25-30. IPAA misreads *Metropolitan Edison* and misunderstands NEPA's role in the agency decision-making process.

The issue in *Metropolitan Edison* was whether NEPA required an environmental analysis prepared by the Nuclear Regulatory Commission to consider the psychological impacts to the surrounding community of restarting one of the nuclear reactors at Three Mile Island. Thus, *Metropolitan Edison* involved the types of impacts that a NEPA analysis must consider and had nothing whatsoever to do with the impacts that a NEPA analysis may consider.[12] IPAA fails to

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[12] The same is true for every one of the other cases cited by IPAA in support of its claim that there is a conflict between the Ninth Circuit's decision in this case and *Metropolitan Edison* and its progeny. *See* Pet. 27-28. *See Cellular Phone Taskforce v. Federal Communications Comm'n*, 205 F.3d 82, 95 (2nd Cir. 2000) (NEPA did not require EIS to consider possibility that radio frequency radiation could interfere with medical devices); *Olmstead Citizens for a Better Community v. United States*, 793 F.2d 201, 204-05 (8th Cir. 1986) (NEPA did not require an analysis by the U.S. Bureau of Prisons to analyze the possibility that converting a mental hospital to a prison would increase crime and hinder development in the surrounding community); *New York v. United States Dep't of Transp.*, 715 F.2d 732, 751 (2nd Cir. 1983) (NEPA analysis concerning the transportation of radioactive

appreciate that these are entirely distinct questions: just because NEPA does not require particular impacts to be addressed does not mean that NEPA is violated if an EIS addresses such issues. There is nothing in NEPA or its implementing regulations that says that an environmental analysis may not exceed the bare legal requirements of the Act. Nor has this or any other court ever held that an agency violated NEPA by analyzing an action too fully.

Moreover, the court in *Metropolitan Edison* did not hold that an EIS must, or even may, ignore the psychological impacts of a federal action. To the contrary, this Court clearly recognized that "effects on human health can be cognizable under NEPA, and that human health may include psychological health." *Metropolitan Edison*, 460 U.S. at 771; *see also id.* at 779 (Brennan, J., concurring) ("There can be no doubt that psychological injuries are cognizable under NEPA."). [13] Plaintiffs in *Metropolitan Edison* did not lose their challenge to the restarting of the nuclear power plant because they alleged a psychological impact. They lost because the psychological injury they wanted analyzed did not result from the environmental impact of restarting the plant, but from their fear of a future accident. *Id.* at 768. The Supreme Court held that the EIS need not consider this psychological injury because it arose "out of a perception of risk." *Id.* at 779 (Brennan, J., concurring) (citing majority

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materials was not required to analyze the psychological impact of the transportation policy).

[13] Courts have also long made plain that a NEPA analysis must consider "psychological" impacts relating to quality of life and impacts to aesthetic sensibilities. *See Hanly v. Mitchell*, 460 F.2d 640 (2nd Cir. 1972); *City of Rochester v. United States Postal Serv.*, 541 F.2d 967 (2nd Cir. 1976); *Maryland Nat'l Capital Park & Planning Comm'n v. United States Postal Serv.*, 487 F.2d 1029, 1038 (D.C. Cir. 1973) ("NEPA contemplates that aesthetic considerations are part of the quality of the human environment.").

opinion at 774-76). To require an EIS to consider fears of possible accidents, the court ruled, "lengthens the causal chain beyond the reach of NEPA." *Id.* at 775.

The aesthetic harms that the public is concerned with in this case, by contrast, flow directly from oil and gas development. Unlike plaintiffs' fears in *Metropolitan Edison*, the public's aesthetic concerns in this case are tied immediately to a change in the environment – the construction of oil and gas facilities – and so are cognizable impacts under NEPA.[14]

Finally, while *Metropolitan Edison* addressed what must be analyzed in an EIS, IPAA's arguments concern the permissible grounds for an agency decision. This is an entirely different question because while NEPA's implementing regulations say a great deal about what impacts must be considered in an environmental analysis, *see*

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[14] IPAA proclaims that there is a "zero percent chance" that anyone would ever experience a change in the environment from oil and gas leasing along the Rocky Mountain Front. Pet. 29. IPAA support this remarkable claim with a citation to the Forest Service's optimistic claim that "limited and closely controlled oil and gas exploration and development can take place in this area without significant negative impacts to wildlife or other surface resource values." *Id.* (citing to Pet. App. 30). IPAA fails to appreciate the difference between measurable physical degradation of an area – *e.g.*, the fouling of a stream or the extermination of a native wildlife population – and the experiential and aesthetic impacts that flow from the development of a pristine area. Even if a natural gas wellsite did not significantly degrade a "surface value" such as water quality, it could certainly degrade the experience of the hiker, horseman, fisherman, or hunter who comes to enjoy the Rocky Mountain Front's solitude and untouched beauty and instead finds natural gas facilities.

40 C.F.R. § 1502, they say nothing whatsoever about the reasons that an agency may invoke in choosing a course of action.

NEPA is a purely procedural statute. *See, e.g., Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988). While NEPA requires agencies to consider the environmental consequences of their actions, NEPA does not require agencies to base their final decisions on environmental factors alone. As this Court has said, "[t]he only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (quoting *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)). *See also Laguna Greenbelt v. United States Dep't of Transp.*, 42 F.3d 517, 523 (9th Cir. 1994) ("NEPA does not mandate particular substantive results, but instead imposes only procedural requirements.") (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978)); *Half Moon Bay*, 857 F.2d at 508 ("If the agency has taken a 'hard look' at a decision's environmental consequences, the decision must not be disturbed."). Thus, IPAA's argument that the Forest Service violated NEPA in its leasing decision by giving too much weight to the public's aesthetic concerns mistakes NEPA's purely procedural role. Because NEPA does not address or limit an agency's ultimate decision, IPAA's argument that NEPA required the Forest Service to weight its decision-making differently must be rejected.

Furthermore, requiring agencies to base their decisions solely on the impacts that must be considered in NEPA's environmental analysis would yield obviously unintended results. For example, when it decides whether to construct a military base – which construction is subject to NEPA – the Department of Defense can obviously consider the national

security need for the base and the strategic importance of a particular location even though neither of these factors must be analyzed in the EIS. Indeed, NEPA's regulations specifically anticipate that an agency may decide to carry out an action for non-environmental reasons. 40 C.F.R. § 1505.2(b) requires an agency to explain its decision in a Record of Decision, a document separate from the EIS. As this regulation recognizes, economic, technical, statutory, and national policy reasons may influence an agency's ultimate decision. *Id.* IPAA's argument to the contrary is baseless.

CONCLUSION

IPAA presents no legitimate reason for this Court to review the unpublished decision of the Ninth Circuit. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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September 25, 2001

App. 1

LEWIS AND CLARK NATIONAL FOREST
OIL AND GAS LEASING

FINAL ENVIRONMENTAL IMPACT STATEMENT
RECORD OF DECISION

Lewis and Clark, Teton, Pondera, Glacier, Cascade,
Chouteau, Meagher, Park, Judith Basin,
Wheatland, Fergus, Musselshell, Golden Valley,
and Sweetgrass Counties

MONTANA

Prepared by:

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MONTANA STATE OFFICE

August 28, 1997

I. INTRODUCTION

Purpose and Description of the Record of Decision (ROD)

This ROD documents the Forest Service decisions concerning which lands will be administratively available for oil and gas leasing in accordance with 36 CFR 228, 102(d) and which lands specifically the Forest Service is authorizing the BLM to offer for lease in accordance with 36 CFR 228.102(e) and Forest Service Policy.

The Mineral Leasing Act of 1920 (as amended) provided that all public lands are open to oil and gas leasing, unless a specific land order or law has been issued to close an area. The Federal Onshore Oil and Gas Leasing Reform Act was enacted by Congress in 1987 and gave the Secretary of agriculture additional responsibilities for leasing decision. Implementing regulations for the U.S. Department of Agriculture at 36 CFR 228 and the Department of Interior at 43 CFR 3100 were finalized and published in the Federal Register on March 21, 1990, and June 17, 1988, respectively. The regulations set forth the procedures by which the Forest Service and the Bureau of Land Management (BLM) will carry out their statutory responsibilities in the issuance of oil and gas leases.

These decisions incorporate the lease terms and stipulations determined necessary to mitigate effects to surface resources. These measures are based on analyses documented in the Lewis and Clark National Forest Oil and Gas Leasing Final Environmental Impact Statement (Final EIS) and the Lewis and Clark National Forest Land and Resource Management Plan (Forest Plan).

These decisions were guided by the results of a comprehensive analysis that considered the cumulative effects of activities on the current and future resources, economics, and social patterns of this highly sensitive area. Also considered was a great deal of public comment expressed both in favor of and against leasing in the Lewis and Clark National Forest; comments received not only at this time, but also over the past two decades on this issue. Although this input may not necessarily reflect the opinion of all affected or interested people, these decisions attempt to balance the conflicting viewpoints and resource concerns.

Decisions of this nature, which may have a lasting-effect on a very significant area, do not come easily. Oil and gas

leasing, and subsequent actions, have been a contentious issue, particularly on the Rocky Mountain Division; an area considered to have high potential for significant hydrocarbons resources while also valued for its wildlife, recreational, cultural and aesthetic qualities. The fact the area in question is held in the highest regard by many people who have never even seen it, makes decisions of this nature even more difficult. As such, none of the pertinent information or substantive comments were taken lightly; all of this information figured into the final analysis in some way. It is important for the reviewer to know these factors were closely considered in the attempt to arrive at a decision which is a balance between conflicts, public opinion, opportunities, supply and demand, resource capability, and the needs of future generations.

This ROD also documents the Forest Service decision to amend the Lewis and Clark National Forest Plan regarding which lands are administratively available for oil and gas leasing and where the Selected Alternative differs from the Forest Plan Standards or Management Direction.

This ROD documents the BLM decision to use the Final Lewis and Clark National Forest Oil and Gas Leasing Environmental Impact Statement as its National Environmental Policy Act (NEPA) compliance document for: 1) offering lands for lease within the Jefferson Division of the Lewis and Clark National Forest subject to stipulations identified in this ROD;, and 2) making private surface-federal minerals within the administrative boundaries of the Jefferson Division of the Lewis and Clark National Forest open for oil and gas leasing.

Purpose and Need for the Action

The purpose and need of this project is, first, to comply with Congressional intent. In response to the Leasing Reform

Act, and in accordance with 36 CFR 228.102, the Forest Service must determine which lands in the Lewis and Clark National Forest are administratively available for oil and gas leasing, and determine which specific lands in the Lewis and Clark National Forest the Forest Service will authorize the BLM to offer for lease. The detailed purpose and need for this analysis can be found in the Final EIS on pages 1-7 and 8.

Geographic Scope

The geographic scope of the analysis area for determination of both the Availability Decision and the Leasing for Specific Lands decision is identified by the boundaries shown on the accompanying maps. The area contains all of the lands administered by the Lewis and Clark National Forest. The area is located in portions of Lewis and Clark, Teton, Pondera, Glacier, Cascade, Chouteau, Meagher, Park, Judith Basin, Wheatland, Fergus, Musselshell, Golden Valley, and Sweetgrass Counties in Central Montana. Within the analysis area there are 1,829,609 acres with Federal jurisdiction of surface use and Federal jurisdiction of minerals. There are an additional 32,966 acres of split estate lands and outstanding mineral reserved rights for oil and gas.

II. DECISIONS AND RATIONAL FOR THE DECISIONS

I have selected from two alternatives displayed in the Final EIS for the availability and leasing decisions. I am selecting Alternative 1(a) for the Rocky Mountain Division. No lands on the Rocky Mountain Division will be offered for lease. Map II-1 displays Alternative 1(a) for the Rocky Mountain Division. I am selecting Alternative 7 for the Jefferson Division. Certain lands on the Jefferson Division will be offered for lease with stipulations to protect resource values.

Map II-16 displays the areas that will be offered for lease and the stipulations that will apply on the Jefferson Division.

Under the implementing regulations, the Forest Service has two decision points relating to oil and gas leasing. In this instance, the Forest Service has decided to combine the Lands Administratively Available Decision, with the Leasing of Specific Lands Decision. Both of these decisions are documented in this Record of Decision. Once these decisions have been made, the Forest Service will have authorized the BLM to offer specific lands for lease subject to appropriate stipulations. After the lands have been leased, the lessee can file an Application for Permit to Drill (APD). An APD must go through further site-specific NEPA analysis and decisionmaking (36 CFR 228.105-109).

The Leasing Reform Act of 1987 modified the authorities of the Secretaries of Interior and Agriculture. The Forest Service developed implementing regulations which defined the procedures to be used and established the foundation for decision-making. The Final Rule was published in the Federal Register on March 21, 1990 (36 Code of Federal Regulations, Part 228, 100 et. seq.; 55 FR 10423).

As we continue discussions in this document we will refer to 228.102(d), as the Availability Decision, and the 228.102(e), as the Leasing for Specific Lands decision. Both of these decisions must occur prior to the time the BLM offers specific National Forest System lands for lease.

The following text describes this decision process.

A. AVAILABILITY DECISION – 36 CFR 228.102(d) – Area or Forest-wide Leasing decisions (Lands Administratively Available For Leasing)

The first decision is which lands to make administratively available for leasing, or which lands are open to leasing. This decision enables the oil and gas industry to know which National Forest System lands may be available for leasing now or during this planning period (about 10-15 years). Forest Service publication of this decision is intended to enable the oil and gas industry to undertake long-range planning. At the same time, the Forest Service makes no irreversible or irrevocable decisions to lease these lands. Under 36 CFR 228.102(d), the BLM shall be promptly notified as to the Forest-wide leasing decisions that have been made by identifying lands which have been found administratively available for leasing.

Based on the information disclosed in the Final EIS, I have selected Alternative 1(a) for the Rocky Mountain Division and Alternative 7 for the Jefferson Division for the availability decision.

Table ROD-1 is a summary of the acres of Lands Administratively Available for Leasing in accordance with 36 CFR 228.102(d). Leasing decisions for specific lands, including stipulations, are discussed in section B and shown in Table ROD-2.

TABLE ROD-1
Areas Available/Unavailable for Leasing

	ACRES	%
Total Forest Area	**1,862,453**	**100**
Legally Unavailable Areas		
Wilderness	385,901	
Forest Plan Recommended Wilderness areas	55,773	
Big Snowy WSA	87,928	
Middle Fork Judith WSA	81,032	
Permitted Ski Areas	3,824	
Total	**614,458**	**33**
Area Administratively Available for Leasing	**1,247,995**	**67**

Rationale for the Availability decision:

In making the decisions on which lands are *administratively* available for leasing or not *administratively* available for leasing I considered:

- Decisions and direction established in the Lewis and Clark National Forest Land Management Plan.
- The analysis of the environmental, social, and economic effects as displayed in the Final EIS.
- The public comments received during development of this Final EIS.

In making this decision, I recognize oil and gas leasing, exploration, and development are a legitimate, permissible, and viable use of National Forest System lands. This is evidenced by several laws affecting the management of these

public lands including the Organic Administration Act of 1897, Mineral Leasing Act of 1920, Mineral Leasing Act for Acquired Lands of 1947, Mining and Mineral Policy Act of 1970, National Forest Management Act of 1976, and the Energy Security Act of 1980. These laws are described in Appendix L of the Final EIS.

The range of alternatives identified and analyzed provided me with sufficient information to make a reasoned decision regarding availability of lands. Chapter II of the Final EIS, pages II-4 through II-14, describes the alternatives I considered, which included alternatives suggested by the public. After reviewing the analysis presented in the Final EIS, I made my decision based on an evaluation of the alternatives to determine which best meets the project purpose and need, and resource objectives, while also responding to the public issues and concerns expressed throughout the project. *I have determined that retaining these lands as administratively available for leasing provides for flexibility in future leasing decisions. This does not mean or require that all administratively available lands be offered for lease at this time.*

The alternatives analyzed range from not making any lands available for leasing to making all lands available and offering them for lease with limited restrictions, with several alternatives falling in between. Consideration was also given to leasing all lands with Standard Lease Terms, to determine whether additional stipulations were necessary. Applying the Reasonably Foreseeable Development scenario to these alternatives provided me with an acceptable range of effects that addressed the significant environmental issues described in the Final EIS on pages II-1 through 3.

B. LEASING DECISION – 36 CFR 228.102(e) – Leasing for Specific Lands Decisions

The Availability Decision and the Leasing Decision are related to each other in that the leases authorized will be on lands earlier found to be Administratively Available for Leasing, and each lease will include the stipulations determined to be necessary in the specific leasing decision.

I have reviewed the availability decision on which lands are administratively available for leasing and authorize the BLM to offer specific lands for lease subject to:

1. Verifying oil and gas leasing on the specific lands has been adequately addressed in a NEPA document, and is consistent with the Forest Plan.

2. Ensuring conditions of surface occupancy identified in Section 228.102(c)(1) are properly included as stipulations in resulting leases.

3. Determining operations and development could be allowed somewhere on each proposed lease, except where stipulations will prohibit all surface occupancy.

In this decision, the Forest Service does make specific decisions to authorize leases on individual, specified areas of land.

Lands Available but Not Offered for Lease at this Time and Rationale for Decision

Regulations under 36 CFR 228.102(e) allow the Forest Service to authorize the BLM to offer *specific* lands for lease. The regulations do not obligate the Forest Service to offer all administratively available lands for lease. The options to the Forest Service include lease all *available* lands, or NOT lease any of the available lands, or to lease

some specific lands at this time with varying stipulations to protect federal resources.

Based on public comment and the information disclosed in the Final EIS, I am selecting Alternative 1(a) for the leasing decision on the Rocky Mountain Division and Alternative 7 for the leasing decision on the Jefferson Division. My decision is to NOT LEASE the following administratively available lands at this time.:

- **The entire Rocky Mountain Division.** The presence of an identified traditional cultural district in the RM-1 Geographic Unit (also known as the Badger-Two Medicine area), and potential impacts to this area from oil and gas leasing and development, are compelling reasons to not offer this geographic unit for lease. In addition, most of this area is presently under lease. The terms of these leases have been suspended by the Bureau of Land Management pending review of the information regarding traditional cultural uses in the area. The existing leases have between 3 and 7 years remaining on their 10-year terms once the suspension is lifted. Two leaseholders have entered into discussions with the Department of Interior in regards to the possibility of trading out of lease rights in the Badger-Two Medicine. Chevron and FINA have indicated that they would be willing to consider accepting bidding credits on offshore leases in exchange for their lease rights in the Badger-Two Medicine. While discussions involving such possibilities are by no means close to being final, the fact that such action is being considered is also compelling reason not to lease these lands in the near future.

The vast majority of those responding to the Draft EIS were strongly against any development for the purposes of oil and gas exploration in the Lewis and Clark National Forest, particularly on the Rocky Mountain Front (the Front), which is within the Rocky Mountain Division. Concerns expressed include potential impacts to wildlife and other surface resources. A majority of the concerns, however, were expressed regarding the "value of place," speaking in particular to social and personal values attributed to the Front. It is clear that this is a very unique and special place to many people; both those who live here in Montana as well as those who have visited or only heard about the area. Many of those who commented during the process admitted they have not read the environmental analysis and many may not fully understand – or care to understand – the analysis. They simply want to express heartfelt emotions about a place they consider special. Many feel that development of any kind, particularly oil and gas development, would "ruin" the special feeling of the Front, regardless of whether they ever saw or experienced the results of development. Their perceptions about the value and spirituality of a place would be affected. Many feel that relatively undeveloped lands such as those on the Front are a diminishing resource, and increasingly hard to find. They point to its uniqueness in that sense. They also feel the need for oil and gas does not outweigh the intrinsic values of the lands in and along the Rocky Mountain Front. Indeed, while the Department of Energy projects an increase in natural gas consumption over the next 15-20 years, combined domestic and imported natural gas supplies are expected to keep pace with this demand.

This analysis, as well as other previous analyses addressing oil and gas issues on the Rocky Mountain Division, show that limited and closely controlled oil and gas exploration and development can take place in this area without significant negative impacts to wildlife or other surface resource values. I also understand that oil and gas technologies have made significant advances in reducing impacts to sensitive areas such as the Rocky Mountain Division, and I expect that these technologies will continue to improve in the future. But, the effects of such activities on social values and human needs and desires are much more difficult to quantify or describe. These difficult concepts have been at the crux of the issue regarding management and uses (particularly oil and gas leasing and development) along the Rocky Mountain Front for many years. The Forest has tried to recognize these social and emotional values and they have figured prominently in my decision not to lease the Rocky Mountain Division. I have considered social values as well as scientific values and recognize the importance of both. There are many disparate viewpoints on the subject of oil and gas leasing and development along the Rocky Mountain Front. It would be an impossible task to please all points of view on this subject.

I recognize the Rocky Mountain Division has high potential for the occurrence of hydrocarbons, even though there are differing opinions on specific estimates of the amount of hydrocarbon resources. Development of these resources could provide economic benefits to local economies as well as the State of Montana and Federal Government. Some have contended that not allowing oil and gas development on National Forest System lands on the

Front will mean that development on adjacent private lands is less attractive and potential revenues from private drilling may be lost. I realize that possible oil and gas revenue has been an important consideration for the State of Montana, as well as some local communities, who are looking for new or additional revenue sources to the economy. It could also be argued that non-monetary or other use values are higher, however, and could result in more revenue from tourism and recreational uses, over time, than alternatives that allow oil and gas development. These, too, are difficult comparisons to make.

The argument has been made that not allowing leasing on the Rocky Mountain Division does not meet Congressional intent for mineral leasing or Forest Service mineral policy. Forest Service mineral policy in relation to minerals management is to encourage, facilitate, and administer the orderly exploration, development, and production of mineral and energy resources on National Forest System lands to help meet the present and future needs of the Nation. It is also policy to ensure the integration of mineral resources through the land and resource management planning process. The analysis documented in the Final EIS is part of that planning process. While my decision will not offer the Rocky Mountain Division for lease at this time, these lands have not been withdrawn nor made administratively unavailable for leasing. In addition, lands on the Jefferson Division identified as having moderate potential for the occurrence of oil and gas would be offered for lease with stipulations.

From the number and context of most of the comments I have received, I feel not leasing the Rocky Mountain Division at this time will preserve

options for future use of these lands, whether that be for wilderness designation or other multiple uses. By keeping these lands as administratively available, I am not foreclosing future options for reconsidering this leasing decision should the need arise. The temporal scope of this analysis is considered to be 10 to 15 years, similar to most other planning documents. The Forest Service has the opportunity to review this analysis and decision any time conditions change from the present.

- **Inventories lands adjacent to Wilderness Study Act areas.** These are lands that border wilderness study areas in the Big Snowy Mountains and Middle Fork Judith River in the Little Belt Mountains. These lands were analyzed, along with lands identified in the 1977 Montana Wilderness Study Act, as to their suitability for wilderness inclusion. While the Lewis and Clark Forest Plan did not recommend these lands for wilderness, Forest Plan direction is to manage them so as to maintain their wilderness character pending final Congressional action. For this reason, I will not authorize leasing on these adjacent inventoried roadless lands at this time. Because exact boundaries of some of these areas have not been finalized, I have included small acreages of land that may or may not be part of the inventoried roadless area. In addition, I have decided not to lease the road corridor leading to the Crystal Lake recreation area in the Big Snowy Mountains. This road corridor is fairly confined with limited occupancy opportunities and receives high recreational use. I feel oil and gas development in this corridor is not compatible with existing uses.

- **River segments considered to be eligible for "wild river" designation under the Wild and Scenic Rivers Act.** Consistent with present Forest Plan direction, these river segments will not be offered for lease at this time.

I feel that it is not appropriate to consider offering these lands for leasing at this time for the reasons stated. However, if the situation changes in the future, I will reconsider this decision. I will do this through the appropriate NEPA documentation that will include public involvement and an analysis to determine appropriate stipulations to include to provide the needed surface resource protection.

This decision will apply to lands currently under lease *when those leases terminate or expire.*

Lands Available and Authorized for Lease and Rational for Decision

My decision to lease the remaining administratively available lands on the Jefferson Division is based on the information disclosed in the Final EIS. I have selected Alternative 7 as displayed in the Final EIS for the leasing decision for specific lands on the Jefferson Division subject to appropriate stipulations and management directives.

I am authorizing the BLM to lease the lands on the Jefferson Division identified as available and authorized for lease with the stipulations described in Alternative 7 of the Final EIS and displayed in Table ROD-2, page 8 and Map II-16.

The rationale for selecting Alternative 7 for lands on the Jefferson Division is consistent with the analysis in the oil and gas Final EIS.

Many of the public comments expressed concern over the compatibility of potential oil and gas activities with other resource values or uses. My decision ultimately offers 891,884 acres of the Lewis and Clark National Forest (about 48% of the analysis area) for leasing with stipulations. Approximately 356,111 acres (19% of the analysis area) will not be offered for lease at this time. Key resources and sensitive sites are to be leased with No Surface Occupancy (20% of the analysis area), and the remaining offered lands would contain protective stipulations (see Table ROD-3).

The Lewis and Clark National Forest Plan provided a foundation for the decisions being made, and served as the proposed action against which other alternatives were considered. For that reason, an alternative that relied almost exclusively on Standard Lease Terms (SLT) for resource protection was not considered in detail. The analysis disclosed standard terms alone could not fully satisfy the objectives of the Forest Plan direction in some resource areas. Amending the Forest Plan to relax constraints upon oil and gas activity would risk compromising the Plan's efforts to make such activities compatible with other resources and uses. This analysis did, however, analyze the use of Standard Lease Terms to determine if additional protective stipulations for certain resources were in fact necessary.

The alternatives presented in the analysis presented a broad range of stipulations for consideration, as well as a range in the amount of lands that would be available, or offered, for lease (see Final EIS, Chapter II, Description of Alternatives). The alternatives were based on issues identified during scoping and throughout development of the document. Appendix F of the Final EIS discloses the objective and justification for each stipulation applied. In each case where a special stipulation is prescribed, the analysis displayed

application of only SLTs would not adequately protect the resource.

Alternative 7 was modified slightly from the Draft EIS to address the concerns of the many people who took the time to respond to the Draft EIS. Those issues and concerns and our responses to them are captured in Chapter IX of the Final EIS. On the Jefferson Division, the Final EIS changes a small area bordered by inventoried roadless lands on the southern edge of the Big Snowy Mountains from No Surface Occupancy (NSO) to No Lease. In consideration of possible cumulative effects of oil and gas activities combined with other reasonably foreseeable actions in the Little Belt Mountains, a Controlled Surface Use (CSU) stipulation was included in the Selected Alternative to protect elk summer range and old growth stands.

The combination of Alternatives 1(a) and Alternative 7 was also chosen as the Selected Alternative because 75% of inventoried roadless lands on the Forest are fully protected through application of the NSO or No Lease designations. Of the over 1,800,000 acre analysis area, only 3 acres of inventoried roadless lands are potentially directly affected and only 450 acres could be indirectly affected (Final EIS, pages IV-98-101, with modifications for Rocky Mountain Division in which all inventoried roadless lands are protected). By selecting Alternative 1(a) for the Rocky Mountain Division, all Management Situation I grizzly bear habitat would be precluded from leasing. Further, a combination of Alternative 1(a) and 7 protects known populations of sensitive fish by either not leasing or applying a NSO stipulation to drainages known to support westslope cutthroat trout. Habitat used by a multitude of wildlife species on the Rocky Mountain Division would not be offered for lease.

Alternative 7 for the Jefferson Division protects developed recreational sites, trailheads, and special use areas by applying a NSO stipulation to a ¼ mile area surrounding them. Soils prone to mass movement are stipulated by CSU to allow for relocation of facilities, or special engineering design, if necessary. Alternative 7 for the Jefferson Division protects scenery resources through use of a CSU stipulation, providing flexibility in locating activities in these areas. Core populations of sensitive plants on the Jefferson Division are protected by a NSO stipulation. A CSU stipulation applied to all watersheds on the Jefferson Division to ensure that road construction and other activities will maintain water quality and quantity. Research Natural Areas and the Tenderfoot Experimental Forest are stipulated by NSO to maintain undisturbed habitats and ensure that research goals can be met. River segments determined to be eligible for wild status under the Wild and Scenic Rivers Act would not be offered for lease, and candidates for scenic or recreation designation on the Jefferson Division are protected by a CSU stipulation to ensure that location and design of facilities are compatible with scenic and recreational uses. Areas identified as having traditional cultural importance to American Indians are not offered for lease under my decision, in recognition of the special values of these areas.

While protecting the resources, Alternative 7 on the Jefferson Division is also responsive to the purpose and need for conducting this analysis by complying with the many laws, regulations, and policies while allowing for potential oil and gas activities in an environmentally sensitive manner. I have determined that authorizing leasing on these lands with appropriate stipulations will not result in unacceptable impacts to any resource (Final EIS, Chapter IV). Therefore, I am authorizing the BLM to lease all available lands *that are authorized for lease* on the Jefferson Division with stipulations described in Alternative 7. The decision applies

to the federal mineral estate on lands within the Jefferson Division.

NINTH CIRCUIT RULE 36-2

CRITERIA FOR PUBLICATION

A written, reasoned disposition shall be designated as an OPINION only if it:

(a) Establishes, alters, modifies or clarifies a rule of law, or

(b) Calls attention to a rule of law which appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

NINTH CIRCUIT RULE 36-3

CITATION OF UNPUBLISHED DISPOSITIONS OR ORDERS

(a) Not Precedent: Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel.

(b) Citation: Unpublished dispositions and order of this Court may not be cited to or by the courts of this circuit, except in the following circumstances.

(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel.

(ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.

(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

(c) Attach Copy: A copy of any cited unpublished disposition or order must be attached to the document in which it is cited, as an appendix. *(New Rule 7/1/2000)*

Supreme Court, U.S.
FILED
OCT 1 2001

No. 01-213

In the Supreme Court of the United States

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, PETITIONER

v.

UNITED STATES FOREST SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an organization of oil and gas producers has Article III standing to challenge the Forest Service's decision, under the Mineral Leasing Act, 30 U.S.C. 181 *et seq.*, not to authorize leasing of particular portions of a national forest.

2. Whether an organization whose interests are purely economic falls within the zone of interests of Section 102(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(C).

3. Whether NEPA prohibits federal agencies from considering public opposition to a proposed action in deciding not to proceed with that action.

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In the Supreme Court of the United States

No. 01-213

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, PETITIONER

v.

UNITED STATES FOREST SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not yet reported. The opinion of the district court (Pet. App. 8-14) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6-7) was entered on May 3, 2001. The petition for a writ of certiorari was filed on August 1, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, an organization of oil and gas producers, seeks to compel the United States Forest Service to

authorize oil and gas leasing under the Mineral Leasing Act (MLA), 30 U.S.C. 181 *et seq.*, within a portion of a national forest. The district court dismissed the action on cross-motions for summary judgment, holding that petitioner lacked standing to sue and, alternatively, that it failed to establish that the Forest Service's actions were arbitrary, capricious, or in violation of any law. Pet. App. 8-14. A unanimous court of appeals affirmed. *Id.* at 1-5.

1. The MLA, as amended by the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (Leasing Reform Act), 30 U.S.C. 226(g)-(h), governs the issuance of oil ~~and gas~~ leases on public lands. The MLA grants the federal government broad discretion in managing mineral resources, including the "discretion to refuse to issue any lease at all on a given tract." *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965).

The MLA originally granted the Secretary of the Interior exclusive management authority over mineral resources on federal lands. See 30 U.S.C. 226(a) and (c). The Leasing Reform Act amended that management scheme and required that the Secretary of Agriculture also authorize leasing before leases may be offered on federal lands within the National Forest System. See 30 U.S.C. 226(h). Accordingly, both the Secretary of the Interior, through the Bureau of Land Management (BLM), and the Secretary of Agriculture, through the Forest Service, must make affirmative decisions to allow leasing before a tract of national forest land may be leased.

The Forest Service's regulations implementing the Leasing Reform Act provide for a staged decision-making process. See 36 C.F.R. Pt. 228. First, Forest Supervisors develop a schedule for analyzing lands under their jurisdiction, with the exception of lands

that are legally unavailable for leasing. See 36 C.F.R. 228.102(b). As part of that analysis, each Forest Supervisor identifies areas as open or closed to leasing, projects reasonably foreseeable post-leasing activity, and analyzes the environmental impacts of such activity. See 36 C.F.R. 228.102(c). Lands designated as open to leasing as a result of that analysis are deemed "administratively available for leasing." 36 C.F.R. 228.102(d). Once the lands administratively available for leasing are identified, the Forest Supervisor may then authorize BLM to allow leasing of some or all of the available lands by making a separate decision allowing BLM to proceed with leasing. See 36 C.F.R. 228.102(e); see generally *Wyoming Outdoor Council* v. *United States Forest Serv.*, 165 F.3d 43 (D.C. Cir. 1999).

The Forest Service's mineral leasing decisions under the Leasing Reform Act occur against the backdrop of the overall management of the national forests under the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. 528 *et seq.*, and the National Forest Management Act of 1976 (NFMA), 16 U.S.C. 1600 *et seq.*

MUSYA provides for the management of the national forests for multiple uses in the manner the Forest Service deems will "best meet the needs of the American people [and] mak[e] the most judicious use of the land" under its jurisdiction. 16 U.S.C. 531(a). The uses expressly authorized are diverse and include outdoor recreation, range, timber, watershed, and wildlife and fish. See 16 U.S.C. 528. The Forest Service's "multiple use" mandate, however, relates only to "renewable surface resources." 16 U.S.C. 531(a). It does not require "the combination of uses that will give the greatest dollar return or the greatest unit output," and it presumes that "some land will be used for less than all of the resources." 16 U.S.C. 531(a).

NFMA provides for a two-stage approach to planning and resource management in each unit of the National Forest System. See generally *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 728-730 (1998). First, the Forest Service develops a land and resource management plan (forest plan), which provides overall management direction for each forest for a ten to fifteen year period. See 16 U.S.C. 1604; 36 C.F.R. 219.11. Forest plans may be amended "in any manner whatsoever after final adoption after public notice." 16 U.S.C. 1604(f)(4). In the second stage of planning, the Forest Service implements individual site-specific projects, such as timber sales, which must be consistent with the forest plan. See 16 U.S.C. 1604(i); *Ohio Forestry*, 523 U.S. at 729-730.

2. The Lewis and Clark National Forest is located in central Montana. The western part of that forest, which is administered as the Rocky Mountain Division, contains lands within the Rocky Mountain range on the eastern side of the Continental Divide. It is "[h]ome of one of the largest intact ecosystems in North America." See 2 C.A. Supp. E.R. (SER) 262. The Rocky Mountain Division has attracted interest for oil and gas exploration because the local geology indicates the potential presence of a large natural gas reserve. Nevertheless, oil and gas drilling in the area is extremely costly. It is characterized by "high risk of failure, * * * extremely complex geological conditions, and * * * added costs associated with complicated environmental mitigation." 1 SER 104. Thus, even though mineral leasing has taken place on the Lewis and Clark National Forest since the 1920s, only four oil and gas wells have ever been drilled within the Rocky Mountain Division. See *id.* at 107.

The 1986 Lewis and Clark Forest Plan took account of the interest in oil and gas leasing. The Plan set out as one of its long-range goals the "coordinat[ion of] resource development and use activities so as to protect and improve land and resource quality and productivity, including natural beauty and quality of air, water, and soil." See 4 SER 734. The Plan identified approximately 1.4 million acres as administratively available for mineral leasing. See *id.* at 739. The Plan, however, made no decision to lease any specific lands; rather, it set out only terms under which leasing might be allowed in subsequent lease authorization decisions. See *id.* at 707 ("Any new leases or reissuance of leases will undergo additional analysis."). Moreover, the Record of Decision approving the Forest Plan acknowledged "people's apprehension over the effects of oil and gas development and their desire for the land to remain unchanged," and concluded that "management of the Rocky Mountain Division should emphasize wildlife, recreation and scenic values." *Id.* at 708-709.

In September 1997, the Lewis and Clark Forest Supervisor, pursuant to 36 C.F.R. 228.102(e), authorized the leasing of administratively available lands within the eastern part of the Forest, but decided not to authorize the leasing of such lands within the Rocky Mountain Division at that time. 2 C.A. E.R. (ER) 358-392. The Forest Service noted that "[t]hese decisions were guided by the results of a comprehensive analysis that considered the cumulative effects of activities on the current and future resources, economics, and social patterns of this highly sensitive area." *Id.* at 361 (reproduced at Pet. App. 23). The decisions, which took account of "a great deal of public comment," *ibid.* (Pet. App. 23), ultimately attempted to strike "a balance between conflicts, public opinion, opportunities, supply

and demand, resource capability, and the needs of future generations." *Ibid.* (Pet. App. 24). The Forest Service also explained that "not leasing the Rocky Mountain Division at this time will preserve options for future use of these lands, whether that be for wilderness designation or other multiple uses." *Id.* at 366 (Pet. App. 32).

3. The Rocky Mountain Oil and Gas Association (RMOGA) filed a lawsuit challenging the Forest Service's decision not to authorize oil and gas leasing in the Rocky Mountain Division, and petitioner intervened as a plaintiff. The RMOGA and petitioner essentially contended that the Forest Service's consideration of public opposition to mineral leasing in its decisionmaking process was not consistent with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, NFMA, MUSYA, and the Establishment Clause, U.S. Const. Amend. I. The district court dismissed the suit based on RMOGA's and petitioner's "lack of standing to sue and failure to establish that the agency's decision was arbitrary, capricious, or in violation of any law." Pet. App. 13. Petitioner, but not RMOGA, appealed that decision, and the court of appeals affirmed the judgment in an unanimous unpublished memorandum opinion. *Id.* at 1-5.

The court of appeals determined that petitioner "lacks Article III standing for its NEPA, NFMA and MUSYA claims because the Forest Service has discretion whether to authorize the leasing of any particular Forest Service lands for mineral leasing." Pet. App. 2. Petitioner correspondingly "has no 'right' to bid for leases on any Forest Service land or to compel the Forest Service to authorize leasing of its land for mineral exploration." *Id.* at 3. Consequently, petitioner "suffered no injury in fact as a result of the Forest

Service's decision not to lease land in the Rocky Mountain Division." *Ibid.* See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 572 n.7 (1992).

The court of appeals also concluded, as alternative bases for affirming the district court's judgment, that (1) petitioner "lacks prudential standing on its NEPA claims because its interest in enforcing the statute is purely economic, and as such does not fall within NEPA's zone of interests," Pet. App. 3; (2) "[t]he Forest Supervisor acted within her authority and in a non-arbitrary manner" in taking into account public opposition to leasing in the Rocky Mountain Division, *ibid.*; and (3) petitioner's "Establishment Clause claim lacked merit" because "the Forest Service's decision had a secular purpose" and was not "an endorsement" of Native American religious beliefs, *id.* at 2, 3; see also *id.* at 3-4.

ARGUMENT

Petitioner seeks review of the court of appeals' determination that petitioner lacks Article III standing and the court's alternative rulings dismissing petitioner's NEPA claims. Petitioner's request for review should be denied because the court of appeals' unanimous unpublished decision is correct and does not conflict with any decision of this Court or of any other court of appeals.

1. The court of appeals correctly concluded that petitioner lacks Article III standing to challenge the Forest Service's determination not to authorize leasing tracts within the Rocky Mountain Division of the Lewis and Clark National Forest for oil and gas leasing. To establish its standing, petitioner must show that it has suffered "injury in fact" that was caused by the government's action and that would be redressed by a favor-

able decision. See, *e.g.*, *Lujan*, 504 U.S. at 560-561; see *Allen* v. *Wright*, 468 U.S. 737, 752 (1984). The court properly applied those principles to the facts of this case and concluded, consistent with the decisions of this Court and of other courts of appeals, that petitioner lacks standing.

a. The court of appeals correctly concluded that petitioner cannot show the requisite injury from the Forest Service's determination not to offer tracts within the Rocky Mountain Division of the Lewis and Clark National Forest for oil and gas leasing. The court recognized that the Forest Service is under no legal obligation to lease those lands. Pet. App. 3. To the contrary, while the MLA specifies procedures when oil and gas leases are to be issued, it "left the Secretary discretion to refuse to issue any lease at all on a given tract." *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965). Because petitioner therefore has no legal right to compel the federal government to issue a lease for particular forest lands, petitioner cannot establish cognizable injury to its members from the Forest Service's decision not to lease those lands. See, *e.g.*, *Lujan*, 504 U.S. at 560 (plaintiff must show "an invasion of a legally protected interest"); *Region 8 Forest Serv. Timber Purchasers Council* v. *Alcock*, 993 F.2d 800, 808-809 (11th Cir. 1993) (timber companies lacked injury despite alleged reduction in timber available for future contracts, because companies had no right to harvest set amount of timber), cert. denied, 510 U.S. 1040 (1994). For similar reasons, judicial review is unavailable because the decision not to offer particular lands for leasing is

"committed to agency discretion by law." 5 U.S.C. 701(a)(2).[1]

Petitioner's argument (Pet. 14-15 n.4) that the statutory language of the MLA gives rise to a "right to bid" is incorrect. The language of Section 226(a)—"[a]ll lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits *may* be leased by the Secretary"—makes clear the government has discretion whether or not to lease particular tracts. 30 U.S.C. 226(a) (emphasis added); see *Udall*, 380 U.S. at 4; see also *Burglin* v. *Morton*, 527 F.2d 486, 488 (9th Cir. 1975) (explaining that "[t]he permissive word 'may' in Section 226(a) allows the Secretary to lease such lands, but does not require him to do so"), cert. denied, 425 U.S. 973 (1976); *McDonald* v. *Clark*, 771 F.2d 460, 463 (10th Cir. 1985) (describing

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[1] Because the Forest Service's inaction is not the sole reason why leases are not available—the Secretary of the Interior must also approve any leasing decisions—petitioner has not established a causal connection between the Forest Service's conduct and any alleged injury to its members, see *Lujan*, 504 U.S. at 560, or demonstrated that the alleged injury would be redressed by entry of a judicial order against the Forest Service, see *id.* at 568-571 (opinion of Scalia, J.). In addition, because the courts have no authority to compel the Forest Service to authorize BLM to offer particular tracts for leasing, petitioner's lawsuit cannot redress any alleged injury for that reason as well. *Id.* at 560-561. The court of appeals also correctly concluded that petitioner lacked standing to bring its procedural claims, including its NEPA claims. As the court explained, petitioner's lack of any right to bid for leases "forecloses [its] argument that it has a procedural right to the proper administration of the various environmental laws." Pet. App. 3. See *Lujan*, 504 U.S. at 573 n.8. (a plaintiff has standing to enforce procedural claims only where "the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing").

power to lease as "discretionary" and explaining that leasing is not required even where land has been offered for lease and a qualified applicant selected). The statutory provisions that petitioner cites do not give petitioner a "right to bid," but merely govern how leases are to be issued after the government has made its discretionary decision to lease particular lands. See, *e.g.*, 30 U.S.C. 226(b)(1)(A) ("All lands *to be leased* which are not subject to leasing under paragraphs (2) and (3) of this subsection shall be leased as provided in this paragraph to the highest responsible qualified bidder.") (emphasis added).

b. Petitioner mistakenly argues (Pet. 14-15) that *Bryant* v. *Yellen*, 447 U.S. 352 (1980), establishes that its members have suffered "injury in fact." The *Bryant* decision involved a challenge to the land ownership limitations of the reclamation laws. This Court affirmed the court of appeals' determination that a group of intervenors had standing to take an appeal because, if the intervenors prevailed in their interpretation of the land ownership limitations, existing land owners would have an increased incentive to sell them "excess" lands. In that case, the court of appeals had made a fact-specific determination, based on its assessment of the likely future conduct of third parties, that the intervenors' injury would be redressed by a favorable decision. See *id.* at 368. Here, by contrast, petitioner, who asserts a claim for relief under a different body of laws and readily distinguishable facts, has failed to establish a redressable injury. See Pet. App. 10 (the government's "main point is that this court is unable to order the executive branch to issue oil and gas leases on the Rocky Mountain Division to Plaintiffs and that therefore no substantial likelihood exists that Plaintiffs' complaints can be redressed"); see also note 1, *supra*.

Indeed, in this case, "a third-party not before the court, the Secretary of the Interior, exerts control over whether oil and gas leases are issued in the Rocky Mountain Division." See Pet. App. 10. Petitioner has made no showing that, even if a court could lawfully compel the Forest Service to alter its decision not to authorize leasing of the lands at issue, the Secretary of the Interior would give its consent to issuance of leases. Cf. *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (finding no standing where redressability "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict"); *Lujan*, 504 U.S. at 568-571 (opinion of Scalia, J.). The court of appeals' decision that petitioner lacked standing rests on the particular circumstances of this case and does not conflict, even in principle, with this Court's decision in *Bryant*. See Pet. App. 2-3.

c. Petitioner is also mistaken in suggesting (Pet. 15-16) that the court of appeals' decision conflicts with *Northeastern Florida Chapter of the Associated General Contractors* v. *City of Jacksonville*, 508 U.S. 656 (1993), and *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995). Those cases involved challenges to procedures for awarding bids after a decision was made to accept competitive bids. In each case, a plaintiff was found to have standing to ensure that the procedures for awarding bids were conducted in accordance with the Equal Protection Clause or a governing statute.

For example, the Court ruled in *City of Jacksonville* that "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the

barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." 508 U.S. at 666. That ruling recognized the distinct nature of an equal protection claim. The plaintiffs claimed injury from "the denial of equal treatment resulting from the imposition of the barrier." *Ibid.* Similarly, in *Adarand Constructors*, the Court stated that "[t]he injury in cases [alleging equal protection claims] is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.'" 515 U.S. at 211 (quoting *Jacksonville*, 508 U.S. at 667). Here, in contrast, petitioner does not allege the denial of equal treatment among potential bidders, and *Jacksonville* and *Adarand* are simply irrelevant.[2]

d. Petitioner's contention (Pet. 20) that it has standing because it is "the object of the [government's] action" is without merit. Petitioner relies on a passage from *Lujan* that distinguishes between instances in which a plaintiff is directly regulated by the government, and is therefore the "object" of government action, and instances in which a plaintiff's asserted injury arises from the regulation (or lack of regulation) of someone else. See *Lujan*, 504 U.S. at 561-562. The Court explained that standing is "substantially more difficult to establish" in the latter instances. *Id.* at 562. That distinction, however, is irrelevant to this case,

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[2] Contrary to petitioner's suggestion (Pet. 17-18), the court of appeals' decision also poses no conflict with the Eighth Circuit's decision in *Arkla Exploration Co.* v. *Texas Oil & Gas Corp.*, 734 F.2d 347 (1984), cert. denied, 469 U.S. 1158 (1985). In *Arkla*, a decision had already been made to offer lands for mineral leasing—in contrast to the instant case—and the court of appeals held only that a would-be bidder had standing to challenge the offering of leases on a noncompetitive rather than a competitive basis, as was allegedly required by statute. See *id.* at 353-354.

which involves the management of federal resources, and not the direct regulation of petitioner.

2. Petitioner also challenges (Pet. 21-25) the court of appeals' alternative ruling that petitioner "lacks prudential standing on its NEPA claims because its interest in enforcing the statute is purely economic, and as such does not fall within NEPA's zone of interests." Pet. App. 3. The court of appeals' analysis is consistent with *Bennett* v. *Spear*, 520 U.S. 154 (1997), and other decisions of this Court addressing prudential standing.

Under the doctrine of prudential standing, a plaintiff must allege an interest within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (quoting *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970)). This Court has explained that "the 'zone of interest' inquiry * * * seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 397 n.12 (1987).

The zone-of-interests of a statute is determined "by reference to the particular provision of law upon which [a] plaintiff relies." *Bennett*, 520 U.S. at 175-176. The particular provision of NEPA cited by petitioner, 42 U.S.C. 4331(a), however, is *not* the provision that forms the basis of petitioner's legal claims.[3] Those claims arise out of 42 U.S.C. 4332(C), which requires the

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[3] Indeed, the subsection of the statute on which petitioner relies is part of NEPA's general "declaration of national environmental policy," see 42 U.S.C. 4331, which does not give rise to an actionable claim. See *Keith* v. *Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997).

government to prepare an environmental impact statement for major federal actions significantly affecting the quality of the human environment. See 1 ER 8 (Compl. paras. 31-34) (alleging deficiencies in environmental impact statement process).

Congress has required the government to prepare an environmental impact statement to ensure that the government fully considers the environmental consequences of major federal actions. See *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (NEPA "focus[es] the agency's attention on the environmental consequences of a proposed project"). In contrast to the provision of the Endangered Species Act at issue in *Bennett*, which required the use of "the best scientific and commercial data available" and had the objective of avoiding needless economic dislocation, see 520 U.S. at 176-177, the NEPA provision at issue here implements Congress's objective of ensuring that the government brings to light the environmental impacts of proposed action. Petitioner does not contend that the Forest Service has failed to identify sufficiently the environmental impacts of the proposed government action, and it has no apparent interest in ensuring that it do so. Petitioner accordingly lacks prudential standing to challenge the adequacy of the Forest Service's environmental impact statement. See, *e.g.*, *Central S.D. Coop. Grazing Dist.* v. *USDA*, No. 00-3567, 2001 WL 1111471, at *2-*4 (8th Cir. Sept. 24, 2001).

Contrary to petitioner's contentions (Pet. 24-25), the court of appeals' observations on prudential standing present no conflict with *Friends of the Boundary Waters Wilderness* v. *Dombeck*, 164 F.3d 1115 (8th Cir. 1999). The plaintiffs at issue in *Boundary Waters* included counties, individuals, and outfitters that sought

to challenge the adoption of a management plan regarding visitor and motorboat use in a wilderness area. See *id.* at 1120. In contrast to petitioner, which characterizes its interests as "solely economic" (Pet. i), the *Boundary Waters* plaintiffs asserted as injury "their own inability to fully enjoy the BWCA Wilderness as a result of the visitor use restrictions," in addition to their alleged economic injuries. 164 F.3d at 1126. The Eighth Circuit was thus not confronted with the issue of whether a party whose interests are "purely economic" falls within NEPA's zone of interests, and accordingly, there is no conflict between *Boundary Waters* and the decision below. Indeed, the congruity between the two circuits' views is reflected in *Presidio Golf Club* v. *National Park Service*, 155 F.3d 1153, 1158-1159 (9th Cir. 1998), where the Ninth Circuit found prudential standing under NEPA based on a golf club's interest in "maintaining an environment, both natural and built, suitable for the game of golf and post-game activities," in addition to its economic interests. See Pet. App. 3 (citing *Presidio*).

Finally, it should be noted that although petitioner's lack of prudential standing served as a proper alternative ground for dismissing petitioner's NEPA claims, it was not necessary to the resolution of the case. Accordingly, this Court has no occasion for reviewing the court of appeals' discussion of that issue.

3. Petitioner's final argument (Pet. 25-30), that consideration of emotional impacts and public opposition to a proposed action is *forbidden* by NEPA, rests on a misreading of *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766 (1983). As the district court succinctly characterized petitioner's argument, "[t]his would be an odd rule of law to ascribe to NEPA, which has the goal of providing notice to the

public of proposed agency action and an opportunity for public input." Pet. App. 11.

This Court held in *Metropolitan Edison* that the Nuclear Regulatory Commission was not *required* by NEPA to consider potential psychological harm caused by the risk of a nuclear accident. See 460 U.S. at 775-779. The Court did not, however, hold that the government was prohibited from considering such harm. See *id.* at 778 ("Until Congress provides a more explicit statutory instruction than NEPA now contains, we do not think agencies *are obliged* to undertake the inquiry.") (emphasis added). Indeed, the Court noted that effects on human health, including psychological health, are cognizable under NEPA. See *id.* at 771. Contrary to petitioner's misreading, NEPA imposes only a procedural requirement that agencies consider the environmental impacts of a proposed action, see *Robertson*, 490 U.S. at 350; it by no means forbids an agency from also considering non-environmental effects. Under petitioner's argument, the government would be barred from considering all sorts of non-environmental impacts, such as national security, economic, or social impacts, even where such impacts might be the motivating policy rationale for a proposed action.

The Forest Service properly considered public opposition to leasing on the Rocky Mountain Division along with other factors that supported the decision not to offer new leases. See Pet. App. 11-12 & n.3. *Metropolitan Edison* does not forbid federal agencies from considering such concerns. The court of appeals' recognition of that established principle does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

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INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,

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UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture, and MONTANA WILDERNESS ASSOCIATION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT

I. THE FOREST SERVICE'S NO-LEASING DECISION IS NOT IMMUNE FROM JUDICIAL REVIEW.

Both Respondents and Intervenors argue that the Forest Service's no-leasing decision is entirely beyond judicial review because it is "committed to agency discretion by law." Rsp. 8-9; Int. 12, Nt. 8 (both citing 5 U.S.C. § 701(a)(2)). However, all agency action is reviewable absent "clear and convincing evidence" of contrary Congressional intent. Pet. 12-13 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)). The APA's judicial review exemption applies only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). The Mineral Leasing Act and NEPA both provide "meaningful standard[s] against which to judge the [Forest Service's] exercise of discretion." *Webster v. Doe*, 486 U.S. 592, 600 (1988). It is well established that parties who oppose oil and gas leasing are entitled to judicial review. *See, Wyoming Outdoor Council v. Dombeck*, 165 F.3d 43 (D.C. Cir. 1999). Thus, it is illogical for Respondents and Intervenors to suggest that those who are in favor of oil and gas leasing are not entitled to judicial review. In any event, this inconsistency raises an important question of federal law that "has not been, but should be, settled by this Court." S.Ct. Rule 10(c).[1]

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[1] Intervenors argue that *certiorari* should be denied because the Ninth Circuit's decision is unpublished, Int. 8-9, but that fact "carries no weight." *Commissioner of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987). This Court regularly grants *certiorari* to resolve circuit court splits created by unpublished decisions or

II. THE NINTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS REGARDING ARTICLE III STANDING.

Under this Court's decision in *Bryant v. Yellen*, 447 U.S. 352 (1980), a party wrongfully denied an opportunity to bid for rights to valuable federal interests suffers an Article III "injury in fact." Pet. 14-15. Such parties have Article III standing even though they cannot "with certainty establish that they would be able to [secure rights to those interests]." *Id.* 15. Respondents ignore this clear legal standard arguing that "[b]ecause [IPAA] has no legal right to compel the federal government to issue a lease for particular forest lands, [IPAA] cannot establish a cognizable injury. . . . " Rsp. 8-9. Of course, the mere fact that the Forest Service's no-leasing decision was discretionary does not mean that IPAA is without Article III standing, Pet. 14-16, and contrary to Respondents" arguments, under *Bryant*, IPAA is not required to prove with absolute certainty that one or more of its 4,500 members would receive an oil and gas lease even though such a result is virtually certain. *Id.*

Respondents also argue that IPAA's injuries are not redressable because "a third-party not before the court, the Secretary of the Interior, exerts control over whether oil and gas leases are issued in the Rocky Mountain Division." Rsp. 11. However, IPAA need only show that its injuries are "likely" to be redressed by a favorable decision. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S.

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when a Circuit Court's unpublished decision conflicts with a decision of this Court. *See, Eastern Coal Corporation v. United Mine Workers of America District 17*, 531 U.S. 57, 61 (2000); *Harry Connick v. Myers*, 461 U.S. 138 (1982).

26, 38 (1976). The Forest Service's no-leasing decision forecloses any possibility of oil and gas development within the Rocky Mountain Division and places an absolute barrier to any IPAA member receiving a lease. If IPAA receives a favorable decision striking the no-leasing decision that absolute barrier will be removed. Thus, IPAA's injuries are indeed redressable. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 261 (1977).

Respondents also attempt to distinguish *Northeastern Florida Chapter of the Associated Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), merely because those cases involve equal protection claims. Rsp. 12. However, as this Court has held: "[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Contrary to Respondents' arguments, the plaintiffs in *City of Jacksonville* and *Adarand* had standing not based on the nature of their substantive claims but, rather, based on their injuries in the form of the government's wrongful denial of the opportunity to bid for valuable government contracts, which injuries are identical to the injuries suffered by IPAA's members. Thus, like the plaintiffs in those cases, IPAA has Article III standing.

Respondents also argue that, because IPAA cannot compel the Forest Service to issue oil and gas leases, IPAA "cannot establish cognizable injury to its members from the Forest Service's decision not to lease those lands." Rsp. 8. In support of this argument Respondents cite *Region 8 Forest Serv. Timber Purchasers Council v.*

Alcock, 993 F.2d 800 (11th Cir. 1993). However, the Eleventh Circuit's holdings in *Region 8* flatly contradicts the Eighth Circuit's decision in *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347 (8th Cir. 1984), where that court held that oil and gas companies had standing based on the wrongful denial of their rights:

> [1] to have the lands not classified arbitrarily, [2] to have the Secretary utilize his discretion properly, and the right [3] to bid for all properly categorized and offered . . . lands for potential profit and exploratory public benefit. . . . Moreover, a proper . . . determination will protect Arkla's interest [4] in having an opportunity to participate in a lawful bidding process. . . .

Id. at 353-54. In the case at bar, the Ninth Circuit sides with the Eleventh Circuit, expanding the growing split between circuits regarding standing to challenge discretionary decisions of the Forest Service. This Court should grant *certiorari* to address that obvious split.

III. THE NINTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND THE EIGHTH CIRCUIT REGARDING THE "ZONE OF INTERESTS" TEST.

Respondents argue that the "zone of interests" NEPA protects does not include the economic effects of agency decision making but, rather, is limited to "ensur[ing] that the government fully considers the environmental consequences of major federal actions." Rsp. 14. However, under the liberal "zone of interests" standards enunciated by this Court in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) and *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987),

"economic effects" are unquestionably part of the "quality of the human environment" that agencies must consider under NEPA. Pet. 21-23. Respondents cite *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), for the unremarkable proposition that NEPA is concerned with the "environmental consequences of a proposed project," Rsp. 14, which proposition, while true, does not address whether "environmental consequences" include economic effects of agency action. No language from *Robertson* distinguishes economic consequences from other environmental consequences; in fact, the *Robertson* decision affirms that economic benefits might outweigh other environmental considerations. *Id.* at 350-51. Thus, *Robertson* confirms that NEPA requires agencies to take a "hard look" at the economic impacts of the proposed action which impacts are an integral part of the "quality of the human environment." 42 U.S.C. § 4332(C).

Next, Respondents attempt to distinguish *Bennett v. Spear*, 520 U.S. 154 (1997), on the grounds that the Endangered Species Act (ESA) provision at issue in *Bennett* "had the objective of avoiding needless economic dislocation," while "the NEPA provision at issue here implements Congress's objective of ensuring that the government brings to light the environmental impacts of proposed action." Rsp. 14. However, like the ESA provision in *Bennett*, NEPA obligates federal agencies to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, *economic*, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a) (emphasis added). Similarly, the CEQ regulations obligates federal agencies to analyze "economic" impacts that relate to any

potential effects on the natural or physical environment. 40 C.F.R. § 1508.14.

Respondents also argue that Section 4331 of NEPA "does not give rise to an actionable claim," yet, admit that Section 4332(C) of NEPA requires the Forest Service to take a "hard look" at all environmental impacts of a proposed major federal action, Rsp. 13-14, which "hard look" must include an analysis of significant economic impacts. Respondents cannot seriously argue that economic concerns are outside NEPA's zone of interest when the Forest Service analyzed the economic effects of oil and gas leasing within the Rocky Mountain Division in preparing its EIS. A.R. Vol. 145; Doc. 1, at IV-113 to IV-125. Likewise, Intervenors admit that, under *Bennett*, economic interests fall within an environmental statute's zone of interests if the plaintiff's suit is based on a particular provision that has an economic purpose. Int. 17, and the above provisions of NEPA each have an undeniable "economic purpose."

Finally, Intervenors admit that the Eighth Circuit's decision in *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999), creates an irreconcilable conflict with the case at bar because, in *Friends*, plaintiffs with purely economic interests were found to have prudential standing under NEPA. Rsp. 17-18. Respondents, on the other hand, argue that *Friends* can be distinguished because, allegedly, the petitioners' interests there were not "solely economic." Rsp. 15. However, this distinction is irrelevant because, in *Friends*, the Eight Circuit recognized the petitioners' standing based on their economic interests:

> the particular provisions relied on by the [petitioners] indicate that the social and *economic*

> effects of proposed agency action must also be considered once it is determined that the proposed agency action significantly affects the physical environment. . . . The regulations implementing NEPA mandate that the term "[h]uman environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.

Friends, at 1125 (emphasis added). The provisions the petitioners relied on in *Friends* are the very provisions IPAA relied on before the Ninth Circuit, yet, the Eighth Circuit held that the petitioners had prudential standing under NEPA claims while the Ninth Circuit held that IPAA had no prudential standing under NEPA. Pet. 24-25. Obviously, the two cases are irreconcilable and this Court should grant *certiorari* to address that conflict.

IV. THE NINTH CIRCUIT'S DECISION CREATES A CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS REGARDING WHETHER AGENCY DECISION MAKING MAY BE BASED ON ATTENUATED "PSYCHOLOGICAL HARMS."

Respondents deny that the Ninth Circuit's decision conflicts with this Court's decision in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), because "effects on human health, including psychological health, are cognizable under NEPA." Rsp. 16. However, "psychological harms" are only cognizable under NEPA if they involve a "reasonably close causal relationship between a change in the physical environment and the effect at issue." *Metropolitan Edison*, 460 U.S. at 774. On that basis, this Court held that the petitioners' claims of "psychological health damage" were too attenuated

and existed "beyond the reach of NEPA." *Id.* at 775. Similarly, the psychological health concerns involved in the case at bar are merely "feelings" and "perceptions" about the "value and spirituality" of the Rocky Mountain Division, are also "beyond the reach of NEPA" and, therefore, cannot be the basis of an oil and gas leasing decision. Pet. 9. Oil and gas development could not negatively impact wildlife or surface resources because No Surface Occupancy (NSO) restrictions would prevent *any* physical disturbance whatsoever to the Rocky Mountain Division. Pet. 8. Likewise, the alleged risk of injury to "experiential and aesthetic" values, Int. 22, n.4, is nonexistent because the NSO restrictions would prevent any visible, aural, or other sensory impacts of oil and gas activities within the Rocky Mountain Division. The hypothetical "risk" of psychological harm upon which the Forest Service based its decision is precisely what this Court rejected in *Metropolitan Edison* and Respondents have failed to address that "critical distinction." 460 U.S. at 779 (Brennan, J., concurring). For the same reason, Respondents cannot distinguish the case at bar from decisions by the Second and Eighth Circuits striking claims that agency decisions may be based on allegations of "psychological harm," Pet. 27-28, and this Court should grant *certiorari* to address this conflict.

Respondents also argue that even if federal agencies are "not required" by NEPA to base decisions on "value and spirituality of [ ] place," NEPA "by no means forbids" an agency from basing its decisions on such intangible, subjective concerns. Rsp. 16. The Ninth Circuit's decision is in accord, App. 3, and would allow federal agencies to base countless, important NEPA decisions on

any subjective, emotional, or psychological criteria proffered by a party participating in the NEPA comment process. This specific argument has national significance and "has not been, but should be, settled by this Court. . . . " S. Ct. Rule 10(c).

Respondents also fail to cite any authority for their assertion that if agency decisions must be based solely upon the criteria in NEPA, "the government would be barred from considering all sorts of non-environmental impacts, such as national security, economic, or social impacts, even where such impacts might be the motivating policy rationale for a proposed action." Rsp. 16. First, obviously, policy rationales such as ensuring the Nation's security take precedence over any environmental concerns. However, in the absence of any such overriding policy rationale, federal agencies must base decisions about the use of valuable natural resources upon the criteria identified by NEPA. Second, rather than barring consideration of economic impacts, NEPA obligates federal agencies to consider the economic impacts of proposed actions. Pet. 23. Third, while federal agencies may consider "social impacts," one of which is economic impacts, there are clear limits on the types of social impacts upon which an agency may base its decisions, such as the limits against most types of "psychological injury" as set forth in *Metropolitan Edison*. "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (citing *Stark v. Wickard*, 321 U.S. 288, 309-310 (1944)). Respondents fail to cite any authority that authorizes the Forest Service to set aside one of the largest single oil and

gas reserves within the continental United States to protect emotional and psychological concerns such as "value and spirituality of [ ] place." Pet. 9. This *ultra vires* expansion of authority is all the more egregious in light of the federal government's findings that "[a] fundamental imbalance between supply and demand defines our nation's energy crisis. . . . This imbalance, if allowed to continue, will inevitably undermine our economy, our standard of living, and our national security." *Report of the National Energy Policy Development Group*, at viii (May 2001).[2]

CONCLUSION

The Ninth Circuit's decision is in direct conflict with the decisions of this Court and the decisions of several Circuit Courts. This Court should grant *certiorari* to address these conflicts.

Respectfully submitted,

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[2] This *Report* may be located at http://www.whitehouse.gov/energy.